SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1291

STATE OF LOUISIANA
(Plaintiff)

versus

JOHN T. HOPPER and JOE A. WOODARD
(Defendants-Petitioners)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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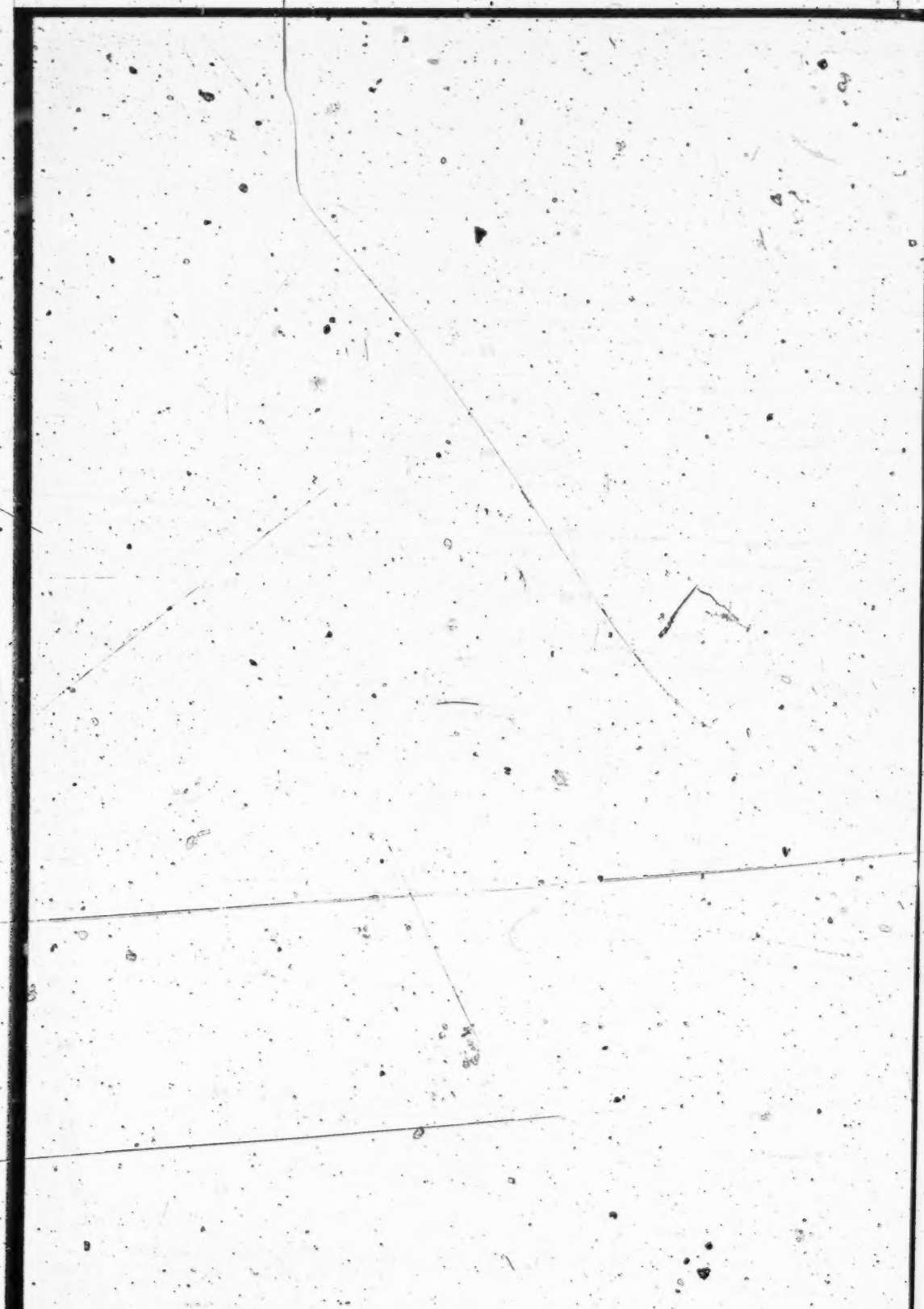

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JOHN T. HOPPER and JOE A. WOODARD
(Defendants-Petitioners)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

John T. Hopper and Joe A. Woodard, your petitioners, pray that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Louisiana which affirmed a conviction of your petitioners of the offense of manslaughter in the Twelfth Judicial District Court, Avoyelles Parish, Louisiana.

OPINIONS BELOW

SUPREME COURT OF LOUISIANA. The opinion of the Louisiana Supreme Court bears the style and citation as follows: State of Louisiana v. Hopper and Woodard, 251

La. 77, 203 So. 2d 222 (1967). A copy of the opinion is appended to this petition and made part hereof. (See Appendix A).

TWELFTH JUDICIAL DISTRICT COURT, AVOYELLES PARISH, LOUISIANA. The trial judge did not write or render a general or comprehensive opinion although he did write per curiae to several of the Bills of Exception. The reasons assigned by the trial judge are interdispersed among the many pages which comprise the voluminous record of this case. The minutes showing the judgment imposing sentence is appended to this petition and made part hereof. (See Appendix B).

JURISDICTION

The judgment and opinion of the Court below (See Appendix A) was entered on June 5, 1967. Rehearing was denied on November 6, 1967. Upon timely motion, the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States, on January 27, 1968, signed and issued an Order Extending Time To File Petition For Writ Of Certiorari to and including April 4, 1968. (See Appendix C).

The jurisdiction of this Court is invoked under the provisions of 28 U.S. Code Sec. 1257 (3).

THE QUESTIONS PRESENTED

Part I. Prosecutor's Conduct

A. Whether the prosecutor's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial.

B. Whether conduct of the prosecutor denies petition-

ers due process when the prosecution is guilty of the following misconduct:

(1) the suppression of evidence tending to destroy the credibility of a major state witness, and arguing to the jury in a manner calculated to give credence to that witness on a point known by the prosecution to be false.

(2) displaying to the jury clothing of defendant which had been excluded.

(3) arguing to the jury about certain excluded evidence after the Court had sustained objection by the defense.

(4) telling the jury that the prosecution had evidence (photographs) which the jury had not seen.

(5) refusal of prosecutor to testify at motion to suppress relative to his knowledge — but acting as both prosecutor and witness at jury trial.

Part II. Severance

Whether denial of a request for severance of two defendants, each of whom made incriminating statements particularly implicating the other, violates their right to cross-examination of a witness who in effect is testifying against them, and secondly, whether instruction by the judge to the jury can adequately protect the accused's right to due process and a fair trial in light of the fact that the jury cannot effectively remove from their minds the part of the confession which implicates the co-defendant.

Part III. Unreasonable and Unconsented Interception of Conversation

Petitioner Woodard while imprisoned, prior to obtaining counsel, (the State contends), had a conversation, which

(if he had it at all) he intended to remain private. A state witness, Rev. John D. Bell, claiming to be in the jail for other reasons, testified that he overheard a portion of a statement importing culpability of Woodard.

The question presented is whether the admission of a fragment of an allegedly incriminating statement (not even necessarily a whole sentence) under these circumstances (1) constitutes a denial of due process, (2) a violation of the defendants' Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel under the *Massiah* case, or (3) violates the Fourth Amendment rights of the accused against unreasonable and unconsented searches and constitutes an unlawful invasion of his privacy under *Katz v. United States*, 88 S. Ct. 507 (1967).

Part IV. Confessions

A. Whether a confession can be held to be free and voluntary and otherwise admissible into evidence when it is obtained from a suspect who at the time is under the influence of intoxicants, in need of medical treatment, not informed that he is to be charged with a capital offense, and who has not been taken forthwith to a committing magistrate in accordance with state law, and further who has not been fully and adequately warned of his constitutional rights against self-incrimination and to counsel?

B. Whether the Court should limit *Johnson v. New Jersey* to its own facts—a pre—*Escobedo* or *Miranda* FINAL judgment attacked in COLLATERAL proceedings, and permit petitioners under the Equal Protection Clause of the Fourteenth Amendment to raise on direct appeal either directly or as part of an involuntariness claim the same Fifth and Sixth Amendment rights pro-

tected in *Escobedo* and *Miranda* which petitioners raised at the time of trial?

Part V. Cumulative Error

Whether the totality of circumstances indicated collectively as set out in Parts I, II, III, and IV of this petition along with other errors committed in the trial of petitioners, including, but not limited to, admission of gruesome autopsy color slides of the deceased when petitioners had offered to stipulate to the cause of the death and the permitting of the jury to take evidence (by viewing the cell in which the petitioners had been confined) outside of the presence of petitioners, constitutes cumulative error of such a magnitude as to deprive the petitioners of their fundamental right to a fair and impartial trial under the due process of law clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment, United States Constitution.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment, United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment, Section One, United States Constitution.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

West's Louisiana Revised Statutes, Title 15, Section 77 (now repealed).

Every peace officer making an arrest or who shall have turned over to him any person arrested by a private person and any person making an arrest of another person shall immediately conduct the person arrested to the nearest jail or police station and then and there cause him to be booked, that is to say,

shall cause to be entered on the book to be kept for that purpose the name of the prisoner and the crime or violation of ordinance charged against him and for which he shall have been arrested. Said book shall always be kept open for the inspection of the public, and the officer in charge shall furnish without cost a certified copy of the entry thereon to any person desiring such copy.

All persons arrested shall, from the moment of their arrest, be entitled to confer with counsel, and shall not be placed in solitary confinement in any jail or precinct station, and denied the right to confer with counsel. They shall be given the right and privilege of using the telephone in the jail or station or send a messenger for the purpose of communicating with counsel and with his friends and relatives for the purpose of securing counsel. They shall also have the right and privilege of using the telephone in the jail or station or send a messenger for the purpose of communication with any person, firm or corporation in order to secure their release by bail or parole and such person, firm or corporation when contacted or communicated with shall have the right to visit said arrested person within a reasonable time, if not charged with a crime in which no release or bail is allowed by law.

No peace officer or other person making an arrest shall neglect, fail, or refuse to immediately conduct the person arrested to the nearest jail or police precinct station and immediately cause him to be booked. Such neglect or refusal shall be prima facie evidence and proof of violation of this Section.

Whoever violates this Section shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned for not more than two years, or both.

This Section shall not be construed as in any wise intended to deprive or divest the superintendent of

police of the city of New Orleans of the right to release upon his own responsibility any prisoner, at any time previous to his actual arraignment in open court. As amended Acts 1950, No. 386, § 1.

West's Louisiana Revised Statutes, Title 15, Section 316 (now repealed).

Person jointly indicted shall be jointly tried, unless the district attorney elect to place such persons separately upon trial, or unless the court, upon motion of defendant, shall, after a hearing contradictorily with the district attorney, order a severance.

STATEMENT OF THE CASE

Part I. Prosecutor's Conduct

At the trial before the jury, Reverend John D. Bell testified that he had visited the Avoyelles Parish Jail on the morning of April 20, 1964 (the day after the arrest of petitioners) and that he heard a conversation between one of the petitioners and an unidentified person. He testified that petitioner said, "I wish to hell I had had time to stomp some more to death". The witness testified that he saw the defendant Woodard who allegedly made the statement and identified him in court. From the testimony of the Sheriff, the Chief Deputy Sheriff, Captain Normand, and the Jailer, it was established that the petitioners were confined in a maximum security cell and would not have been visible to Reverend Bell and thus he could not have identified the speaking party. During the course of the prosecutor's argument to the jury he made the following statement:

"And this security, Gentlemen of the Jury, this security in the jail—that's too big a joke to even discuss. I want to ask you this—you all looked in that jail cell—and I don't like to mention that with

> ladies present, and this large crowd in the courtroom, **but did you all see a toilet in there?** These men had to go to the toilet from the time that they got in there Sunday morning until sometime Monday morning—I feel certain. You don't think they'd let them out."

As shown by the testimony as well as the stipulation taken at the motion for a new trial, the prosecution knew and had been informed that on April 19th, 20th, and 21st and at all times up until a short time prior to the trial of this case, there was, in fact, a toilet in the cell occupied by the defendants on April 19th, 20th, and 21st, 1964. Counsel for defendants did not learn, until after verdict, of the facts as they actually existed on April 19th, 20th and 21st, in 1964.

During the course of the trial before the jury, after the court had sustained a defense objection, the prosecutor persisted in making statements relative to possible perjury by a witness in his testimony before the grand jury. Similarly, after a physical exhibit—clothes of one of the defendants—had been excluded, the prosecutor in the guise of questioning a witness displayed the clothes in the presence of the jury.

During the prosecutor's argument to the jury the intentional inference was given that evidence was being withheld from the jury by the following remarks of the prosecutor:

> "I will agree with one thing—one that that was said—I will agree with this. A picture is worth ten thousand words. **I had a lot of pictures and you all couldn't see them.**"
>
> BY MR. GRAVEL:
>
> "That's objected to if the Court please—"

BY THE COURT:

"What was that statement, Mr. Roy?"

BY MR. ROY:

"I said I had a lot of pictures they couldn't see".

BY MR. GRAVEL:

"That's objected to if the Court please as being improper and prejudicial to the defense, and I again move for a mistrial."
(See Record, p. 3809)

At another point the prosecutor said:

"The first witness that we called if you remember was Mr. Richard Couvillion. He's a former teacher here at Marksville who taught Vocational Education, and he had made a little model that cost me a hundred dollars that I thought (Interrupted)"

BY MR. GRAVEL:

"Just a minute, Mr. Roy, I'm going to object to the District Attorney talking about a model that's not in evidence. It was withdrawn by the State."

BY THE COURT:

"I will sustain the objection."

BY MR. ROY: (CONT'd)

"Well, I tried to introduce something, you all know what it was, but like everything else . . ."

BY MR. GRAVEL:

"Just a moment—I object to that, Your Honor. Objection number one is the District Attorney saying that he tried to introduce, and what it was. That is not evidence. Now if Your Honor please I object to that, I ask the Judge to tell the Jury to disregard it, and I think that the State should also be instructed to only talk about the evidence that's in this case. Not about

anything that was withdrawn by them or that was not admitted in evidence."

BY THE COURT:

"That's true, gentlemen. You are to disregard the statement. Only the evidence that is admitted in the case is to be considered by you. The statement here about the exhibit that he withdrew from the evidence is not to be given any consideration whatsoever." (See Record, p. 3748-3749).

At another point the prosecutor said:

". . . we had pictures, and they didn't show any rocks, and it was objected to when we tried to get them to you." (See Record 3809)

Prior to the trial of petitioners on the merits, a pretrial motion to suppress evidence was filed and during the course of the hearing on it the defense called the prosecutor to the stand as a witness. Counsel for the defendant asked the District Attorney the following question:

"And in that connection as District Attorney was there brought to your attention on April 19th, 1964 (the day the instant crime is alleged to have been committed) any information regarding an occurrence out at the Pelican Club here in Marksville that resulted in the death of the young Beason Boy?"

After responding affirmatively to this question, the District Attorney was asked at what time the information was brought to his attention. He then said:

"First of all I wish that this tragedy had never occurred.

"Secondly, that I have a job to perform here and this is an adverse proceeding and I don't feel that counsel for the defense has a right to cross-examine me, there is no such procedure, as District Attorney

> and I feel that there will be a time in this case when I will perhaps have to take the stand and until such time I would—at that time I would be subject to cross-examination. Until that time does arrive, I object to being questioned as to what occurred or any of my notes or information that I may possess as District Attorney because in effect the District Attorney is the State's (inaudible) in any criminal case. For those reasons I object to being called under cross-examination at this time."

The District Attorney's objection was sustained by the judge and although the testimony of another witness alleged that the District Attorney at least partly advised the defendants on some aspects of their rights prior to one of their statements, the defense was not permitted to elicit from the District Attorney just what he advised the petitioners. Thereafter, during the course of the trial before the jury, the District Attorney both prosecuted the case and testified before the jury, taking the witness stand several times, over the objection of the defense.

Part II. Severance

Defendants, John T. Hopper and Joe E. Woodard, were jointly indicted for murder of Joseph Ralph Beeson. Prior to trial, the State in response to motions by defendants, indicated it had and intended to use in evidence certain oral incriminating statements or confessions by each of the defendants. Some of the purported confessions had been reduced to writing but were unsigned by either defendant. Other of the purported statements or confessions had not been reduced to writing and were oral. The State voluntarily in response to motions gave a copy of the unsigned statement or confession made by each defendant to counsel for defendants. Each of these statements (reduced to writing but unsigned) implicated the co-defendant as

well as the defendant making the statement. After a motion filed to suppress these incriminating statements and confessions was denied, each defendant filed a separate motion for severance alleging as grounds that the other defendant had made an incriminating statement or confession which also implicated the mover. The motions for severance were denied, and after a joint trial in which neither defendant testified, both defendants were convicted of manslaughter. In addition to the confessions reduced to writing other statements of each defendant implicating the other were admitted in the course of the trial, including a conversation allegedly overheard by a witness while the defendants were incarcerated.

Part III. Unreasonable and Unconsented Interception of Conversation

Petitioners were arrested on April 19, 1968, and after interrogation, without the benefit of consultation with counsel, they were incarcerated in the parish jail. The Bills now under discussion were taken in connection with the testimony of a Reverend John D. Bell. Reverend Bell claims to have been a Minister of a Marksville church at the time of the alleged crime. He testified that on Monday morning (the day following the arrest of the accused and while they were incarcerated in the Avoyelles Parish Jail) he went to the Jail for the purpose of ministering to those who needed spiritual help. He further testified that he saw the two accused and a third person, whom he could not identify, in the same jail cell; that he was about 6 or 8 feet from the cell where the three persons were; that he was standing in the hallway portion where he could be seen from the cell; that he did not know who the third person in the cell with the accused was; that he could not see which ones were doing the talking nor which ones were responding, etc.; that he stood there about 3 or 4 minutes;

that **he heard one of them whom he identified on the trial as Defendant Woodard,** say "I wish the hell I had time to stomp some more to death"; that he did not know what had led up to that particular statement; that he did not hear anything that anybody (of the three) said **before** the quoted statement nor did he hear anything **after** the quoted statement was made; that **the quoted statement was all that he heard.** The District Attorney then stated to the Court that he submitted and offered that the State had established a proper predicate and foundation to have the testimony of Reverend Bell admitted into the record and before the Jury and would like to offer his testimony in support of that predicate at this time. Counsel for defendants objected to the offering and submission made to the Court, urging the same objections and offerings and attachments made to prior submission on the ground that the proper foundation had not been laid. The Court overruled the objection and Bill No. 46 was reserved.

In the presence of the Jury the District Attorney elicited from Reverend Bell the same testimony after the defendants had made the same objections and the Court had made as related in connection with Bill of Exception No. 46.

There is some variation in the testimony of Reverend Bell outside the presence of the Jury and in the presence of the Jury. His testimony in the presence of the Jury was that he had never previously on any occasion spoken to either of the two defendants. He further testified that he had overheard defendant Woodard say "I wish to hell I had time to stomp another one to death".

Part IV. Confessions

In response to an application for Bill of Particulars petitioners learned the prosecution had and intended to use

at the trial (and subsequently did use at the trial) certain oral incriminating statements or confessions from each of the petitioners. A motion to suppress was filed in behalf of each petitioner and denied by the trial judge.

Harold J. Henderson, Chief Deputy in the Sheriff's Office in Avoyelles Parish, interrogated the defendants on the morning of April 19, 1964 and reduced to writing the statements. He testified he commenced interrogating Woodard at approximately 4:00 A.M., and that Deputy Hebert Bordelon and Chief Paul Dubea were in the office. Henderson's testimony with respect to what was told Woodard is as follows:

"Q. Did you tell him that he did not have to make a statement?

"A. I asked the District Attorney to bring his rights to him.

"Q. You asked the District Attorney to?

"A. Yes.

"Q. You didn't explain his rights to him at all yourself, did you?

"A. I might have said something—told him what the District Attorney said, but the District Attorney was in there at the time and I asked him to explain to Mr. Woodard his rights.

"Q. But you yourself did not undertake to advise him about any of their legal rights, did you?

"A. Yes.

"Q. What did you tell them?

"A. The District Attorney told Mr. Woodard and I told Mr. Hopper.

"Q. Told him what?

"A. Of his rights.

"Q. Well what did you tell him is what I want to

know and what did the District Attorney tell them what did you say and what did he say?

"A. **Well, I can't recall,** I can tell you in essence of what he said but I can tell you what I said..

"Q. All right, tell us first of all what you say the District Attorney told, we take Woodard first, and tell us what he told him in your presence.

"A. As I recall it he told Mr. Hopper—

"Q. Let's deal with Woodard first.

"A. I mean Mr. Woodard. Pardon me, it was my error. Mr. Woodard I sat down to take a statement or interview Mr. Woodard, and the District Attorney was there and I said—in essence—'before we go any farther, Mr. Roy as District Attorney explain to Mr. Woodard his rights.'

"Q. And what did he say?

"A. He told him that 'you don't have to make a statement if you don't want to and if you make a statement it can be used against you in a Court of law, you are entitled to an attorney' and that's the main things I recall him saying.

"Q. Did he ask them if they wanted to use the telephone to call an attorney?

"A. Not that I recall.

"Q. Did either of you tell them that they had a right to obtain counsel right then and there if they wanted to?

"A. Well no, I figured two intelligent college boys sitting by a telephone after they had that much explained to them they could use their own discretion as to what they wanted to do at the time. I thought we went at length in explaining their rights and especially that they didn't have to talk or say anything.

"Q. But you didn't tell them that they had a right

to immediately get a lawyer and they could call and get a lawyer if they wanted to.

"A. I told them they had a right to get a lawyer, call a lawyer.

* * * * *

"Q. Could you tell whether Mr. Woodard appeared to have been drinking, whether he was under the influence of alcohol to any extent?

"A. Well, I would say that he had been—appeared that he had been, but he had **sobered up somewhat at the time.**

"Q. He wasn't completely sober though was he?

"A. Well, having been the first time I ever saw him I wouldn't know how it affected him to that degree, whether he was—he wasn't incoherent, he responded to conversation and so forth, Mr. Woodard did.

"Q. You said a moment ago you could tell he had been drinking and he had sobered up somewhat. Is that what you meant to say?

"A. Yeah. He wasn't obnoxious or anything, he was calm and cooperative.

* * * * *

"Q. Did you or Mr. Roy tell Mr. Woodard what he was charged with or that he had been charged?

"A. I did not.

"Q. Did Mr. Roy tell him?

"A. Not that I recall. I couldn't say.

"Q. You didn't tell him that he had been charged at all or that he was going to be charged or anything of that nature?

"A. No, not prior to that.

"Q. Did either you or Mr. Roy tell him what offense you all were interrogating him about?

"A. Yes.

"Q. What offense did you tell him you were interrogating him about?

"A. I told him we were interrogating him—I didn't say interrogating, but we wanted to find out what happened at the Pelican Club.

"Q. But you **didn't mention any offense**, anything like murder or manslaughter or negligent homicide or assault and battery, battery, or anything like that did you?

"A. No, I didn't know what it was at the time.

* * * * *

"Q. Did either you or Mr. Roy ever tell either—or anybody else to your knowledge, tell either Mr. Woodard or Mr. Hopper that they had the right and privilege of using the telephone or the right and privilege to send a messenger for the purpose of communicating with an attorney or that of communicating with their friends, their relatives, for the purpose of securing an attorney?

"A. No, I just gave them a gist of their rights and had they been illiterates I might have gone into detail but college students, I—

"Q. The reason you didn't go into detail was because they were college students?

"A. Intelligent boys. That no one was taking advantage of them, we tried to make them understand that.

* * * * *

"Q. Now getting back to the statement that you got from Mr. Woodard, did you write that out in your own handwriting?

"A. I did.

* * * * *

"Q. Now, this statement is not a signed statement is it?

"A. No, it isn't.

"Q. Can you tell me why it was not signed?

"A. I read the statement or notes that I took, I read them back to him and I again advised him of his rights, that you are not required to sign this and he said 'well, I don't want to sign it' I said 'I prefer you didn't sign it.'

"Q. Did he say that there were some things that were wrong in what you read back to him?

"A. When I read it back to him I asked him if in essence that was correct statement, he said yes, but he didn't want to sign it. I told him I prefer that he didn't sign it.

"Q. Why would you prefer that he did not sign it?

"A. Because that wasn't his exact words.

"Q. Is that same thing true insofar as the statement of Hopper is concerned?

"A. Right.

"Q. Neither one of them are their exact words?

"A. That's right.

* * * * *

"Q. Are you saying that the only question then that—questions then that you asked them was regard to their names, ages, addresses and then asked them to tell you what happened?

"A. No, I wouldn't confine it to that. No. But they led in conversation, both of them. They were very cooperative and they tried the best they could to tell what happened.

"Q. Did you tell either one of them or anyone tell either one of them in your presence that these statements were being obtained from them to

determine whether or not charged would be filed against them?

"A. No, I don't recall telling them that. The only thing I told them that if they did give a statement it could be used against them in a Court of law."

Defendant Woodard and Defendant Hopper were respectively 20 and 21 years of age at the time of the alleged offense. Both were students at Louisiana Tech at Ruston, Louisiana. The alleged offense was committed shortly after midnight of Sunday, April 19, 1964. On the previous day, April 18, 1964, a Saturday, the defendants began their day at approximately 7:00 a.m. They ate no breakfast and attended classes that morning. For lunch they ate hamburgers and then at approximately 3:00 o'clock in the afternoon they decided to go to the Pelican Club in Marksville, Louisiana. The defendants, together with two other Louisiana Tech students Cyrus Frazier (sometimes referred to as "Billy" Frazier) and Charles Gaharan left Ruston in Woodard's automobile. On their way they stopped at Jonesville, Louisiana where they each purchased a six pack of beer most of which they drank before they got to Alexandria. They stopped at Alexandria and ate supper, each of them drinking another beer at that time. They proceeded on toward Marksville, stopped at the Ranch House Motel on the outskirts of Marksville. They rented a room at the Ranch House and then went on to the Pelican Club where they bought two fifths of whiskey. The Pelican Club is a large dance hall catering to young people desiring to dance and at which place alcoholic beverages are sold.

They drank most, if not all of the two fifths of whiskey, and additionally drank more whiskey given to them by mutual friends at the Club. They engaged in the usual

activities prevalent at such places, that is, drinking and dancing.

While at the Pelican Club the deceased Beeson became involved in an argument with persons other than the defendants who accused Beeson of stealing whiskey from their table. No altercation of any kind occurred in the club.

At approximately 1:30 the music at the Club terminated and for all practical purposes the Club closed for the evening. The accused, the deceased Beeson, Frazier, Gary Morrison and Winston Miller left the Club through the front door at approximately the same time. Gary Morrison and Winston Miller had accompanied the deceased Beeson to the Pelican Club, they traveling to Marksville in Beeson's car from Alexandria.

Shortly after they got outside of the Pelican Club the deceased Beeson struck the defendant Hopper with a whiskey glass, severely cutting Hopper's ear and neck.

The defendants contend that the deceased Beeson struck Hopper without cause or provocation. Shortly after this encounter the defendants, together with Frazier left the Pelican Club parking lot in Woodard's automobile and returned to their room at the Ranch House Motel.

Patrons of the Club found Beeson, at or near the slab or walkway along the side of the Pelican Club, bleeding, and called the Sheriff's Office. The testimony of the Deputy on duty at the Sheriff's Office was to the effect that it was reported that a truck had struck someone at the Pelican Club. Chief Paul Dubea of the Marksville City Police who happened to be in the Sheriff's Office at the time had an ambulance dispatched to the Club and he and his assistant went to the Pelican Club to investigate. When Chief Dubea arrived at the Club he found 40 or 50 patrons

of the Club around Beeson who was lying on the ground off of the slab and between the slab and a panel type truck which was used for transporting the band instruments for the musicians who played at the Club. Chief Dubea testified that these people who were around Beeson at the time were drunk and were cursing. A young lady named Ducote told Chief Dubea that she had seen three young men take off in an automobile and gave him a description of the car and its license plate number. **Without making any further investigation of any kind,** he immediately undertook a search in the Marksville area for the automobile. As a result of typical police procedure, the ownership of the automobile was determined to be that of the defendant Woodard. Chief Dubea found the automobile parked outside the Ranch House Motel. He observed blood on the inside of the car. He knocked at one of the rooms and upon being invited in found the defendant Woodard, Frazier, a young man named Nobles and Noble's wife, the latter two having arrived at the Ranch House Motel room of the defendants shortly after the defendants and Frazier had arrived there. Chief Dubea asked who owned the automobile outside, referring to the automobile that he was looking for and Woodard, who was lying on the bed in the room, stated that he was the owner. Chief Dubea then told the occupants of the room that "the boy that you all (sic) the fight with, he's dead". Chief Dubea then testified that one of the young men in the room admitted having beaten Beeson. At this point, Chief Dubea told the three young men in the room, Woodard, Frazier and Nobles, that they were under arrest and when one of them asked "What for?" Chief Dubea replied "For murder". Chief Dubea then took the three young men to the Sheriff's Office where they were interrogated.

At the time Chief Dubea was in the Ranch House Mo-

tel, the defendant Hopper was in the closet. Hopper was later taken to the Sheriff's Office by other officers.

While Frazier, Woodard and Hopper were in the radio room of the Avoyelles Parish Sheriff's Department and together there, Frazier asked Deputy McNeal on duty in the radio room whether they (Frazier, Woodard and Hopper) could use the telephone. According to Frazier, the officer replied: "Just sit down and be quiet, not until we get through with you". In response to the question as to why he wanted to use the telephone, Frazier testified that he wanted to call "somebody to get me a lawyer or something and notify my parents and I was so scared I didn't know what to do and I wanted to get somebody that did know what to do."

The evidence disclosed on the hearing of the Motion to Suppress that there were several people apparently in an ugly mood around the Ranch House Motel when Chief Dubea arrived there, and there were numerous people in the hallway just outside the entrance to the Sheriff's Office when the accused were there.

According to Dr. F. P. Bordelon of Marksville, who attended defendant Hopper medically about 8:30 a.m. on April 19, 1964 and after statements were purportedly taken from Woodard and Hopper, Hopper's ear was severely cut and there were lacerations on his neck and head. On the trial of the case, Dr. Bordelon testified that the injury Hopper had could have caused his death had it been just a few inches away from its actual location because at that point a jugular vein could have been damaged, causing him to bleed to death. The doctor testified that the wound required nine sutures.

At the time Hopper was at the Sheriff's Office and at

the time he was interrogated by officers, he had not been given any medical attention whatsoever for the injured ear and neck, and according to the testimony of the officers themselves, when he was brought to the office he slumped in the chair as if something was wrong with him and his ear was bleeding. It is significant to note that the encounter between Hopper and the deceased Beeson occurred at approximately 1:30 a.m. and his interrogation by Major Henderson in the Sheriff's Office did not commence until approximately 5:00 a.m. The interrogation of Woodard commenced at approximately 3:00 a.m. Each of the accused was interrogated for approximately one to one and one-half hours. No medical attention whatsoever was given to Hopper until approximately 8:30 a.m.

Both of the accused had been awake from 7:00 a.m. Saturday morning, had no sleep and had consumed considerable beer and whiskey at the time of the interrogation by deputies on Sunday morning. From the time that they were brought to the Sheriff's Offiec until purported statements were taken from them by Major Henderson they were held incommunicado.

Deputy McNeal, to whom Frazier directed his request to use a telephone on behalf of himself and the two accused, never denied that he was asked permission to use the telephone. His responses to questions by counsel for defendants were "I don't remember if any of them asked me to use the phone or not" and "they could have asked me and I may have said something but I don't remember what it was" and he "wouldn't deny that they may have asked him that question". The Motion to Suppress Evidence sought to have excluded from the evidence in this case the two purported statements made by the defendants and which appear in the record as "Movers' Exhibits 8 and 9" and "State Trial Exhibits 10 and 11."

Part V. Cumulative Error.

In addition to all of the facts enumerated above in Parts I, II, III and IV, numerous other errors are alleged by petitioners to have cumulatively denied them of due process. Examples of these include:

A. Admission of gruesome autopsy color slides.

Dr. John Maxwell of Alexandria, a specialist in pathology, performed the autopsy on the instant victim on April 19, 1964, acting at the request of Dr. Henry J. Kaufman, Jr., Coroner of Avoyelles Parish. To better orient himself and for a diagnosis pertaining to the cause of death, Dr. Maxwell made pictures of the autopsy. He took color slides, which were later developed into photographs.

State's Exhibits 1-TB through 6-TB consist of: 1) a picture slide of a full face view of Joseph Ralph Beeson; 2) a picture slide of the right side of the head of Joseph Ralph Beeson; 3) a picture of the left side of the head of Joseph Ralph Beeson; 4) a picture slide of the under side of the brain of Joseph Ralph Beeson; 5) a picture slide of the floor of the skull of Joseph Ralph Beeson; and 6) a picture slide of both lungs of Joseph Ralph Beeson.

Counsel for the defendants objected to the offering of the slides in evidence for these reasons:

1) Proper foundation for their introduction had not been laid;
2) There was no predicate established that would permit the purported offering to be received in evidence;
3) They were taken at a time too remote to be relevant or material or of any probative value;
4) They were not necessary or material to any issue or fact involved in this case at that time;

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4) They were not necessary or material to any issue or fact involved in this case at that time;

5) They were gruesome, ghastly, shocking, emotionally disturbing and were prejudicial, if received in evidence and viewed by the jury, to the rights of the defendants;

6) There was no dispute as to the cause of death; counsel had stipulated: —"Defense wishes to stipulate that Ralph Beeson died in the early morning hours of April 19, 1964; that his death resulted from trauma to the brain incidental to and attendant to a basal fracture of the skull."

7) That the autopsy and what was revealed thereby was not the handiwork of either defendant, but the handiwork and professional handiwork as a result of Dr. Maxwell;

8) That there was no probative value that could be attached to the offerings.

The trial court viewed the slides and then permitted the jury to review them projected on a screen.

B. Taking of evidence out of the presence of the defendants.

Lionel Bonstaff, Jailer with the Sheriff of Avoyelles Parish, gave his testimony with respect to jail conditions and the events which occurred in the jail itself. After the District Attorney questioned the witness, the following colloquy took place:

"BY MR. GRAVEL:

Your Honor, in connection with the testimony of this witness the defendants request of the Court that the Jury be permitted to see the cell where these defendants were, and have without making any statement have Mr. Bonstaff demonstrate how he opens and closes that particular cell door. They will know and be able to visualize and see the cell and the area adjacent thereto.

"BY MR. ROY:

Your Honor, before you rule on this the State certainly has no objection to the Jury going up to the jail, as a matter of fact we would want them to go up but this is a very obvious attempt to impeach the testimony of Reverend Bell, who is not here to defend himself. I would like to ask the Court to withhold allowing the Jury to go up there. If this man can demonstrate such things I'd like to have Reverend Bell here to be able to demonstrate things to the Jury too, then we will all go up there.

"BY MR. GRAVEL:

Reverend Bell didn't even know which cell they were in.

"BY MR. ROY:

He can show which one he was in—

"BY MR. GRAVEL:

I'm not here to argue that, I think that the request in the light of the testimony of this witness and as part of the defense of this case we request—the request is one that certainly should be made—we do make it on behalf of the defendants, and ask Your Honor to grant the request.

"BY THE COURT:

I think we can work that out some time before it goes to the Jury.

"BY MR. GRAVEL:

Your Honor, I'd like to do that now, please, if I may.

"BY THE COURT:

I would have to have a conference with you gentlemen, there's some complications there that I don't know how to work out at this time.

"BY MR. GRAVEL:

I believe I can anticipate them, may we approach the bench?

"BY THE COURT:

Yes.

* * * * *

"BY MR. GRAVEL:

Yes, sir, by reference make it a part of the record, and by reference refer to it as 'defendant's Exhibit 22' (red Corvan Panel Truck inspected by the jury)—by reference I also make part of the record 'Defendant's Exhibit 23'—the jail. I think that's proper, Your Honor."

The jury had examined the jail cell at the time of counsel's statement. **Neither defendant was present** during the examination.

A reading of the testimony of record discloses that the testimony of the witnesses was contradictory with respect to the security and physical conditions, appearance, appurtenances, and visibility of the jail cell occupied by the defendants on Monday, April 20, 1964.

The purpose of counsel was to let the jury see for itself the cell occupied by the defendants on April 20, 1964, and then make its own decision as to the credibility of the witnesses' testimony with respect thereto.

REASONS FOR GRANTING THE WRIT

Part I. Prosecutor's Conduct

All criminal trials are adversary proceedings. However, there are certain well defined limitations of the extent to which the prosecution can go in order to obtain a conviction and still give proper regard for the constitutional

rights of the accused to a fair trial. The primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done.

It is submitted, that in the particulars set out in the Statement of Facts, the prosecution was guilty of gross misconduct in the course of the trial which denied petitioners their right to due process and a fair trial, and that further, the prosecution violated its duty to disclose to the defense admissible evidence which would have been useful to the defense and this failure to disclose resulted in prejudice to petitioners.

Principally what is involved is the suppression by the prosecution of evidence which would support and corroborate the defense testimony that Rev. Bell could not have seen or identified the petitioner Woodard at the time he allegedly made a statement and the affirmative argument by the prosecution to the jury a state of facts (tending to corroborate Reverend Bell) which the prosecution knew at the time to be false. The other acts of misconduct by the prosecution although constituting prejudicial error and violation of the accuseds' right to a fair trial in themselves are also particularly relevant to show the overall pattern and scheme of the prosecution motive. These other acts of misconduct suggest **why** the prosecution suppressed the testimony which would impeach Reverend Bell's testimony and **why** the prosecution argued and inferred a false conclusion as to the existence or nonexistence of toilets in the maximum security cell. The reason was to obtain a conviction without regard for the fundamental fairness or justice to which all defendants are entitled from the prosecution.

It is noted that the jury was permitted to inspect the maximum security cell. The two defendants however, were

not present at this time and therefore did not see what the jury had seen.

Ordinarily there might be no significance attached to the absence of the accused at the viewing of a scene such as involved in this case; however, the importance of their absence was brought into sharp focus in this case by reason of the remarks made by the District Attorney in his closing-rebuttal argument and which have been quoted hereinabove.

By those remarks the District Attorney in effect told the Jury that Reverend Bell must have been telling the truth when he testified about overhearing the incriminatory statement purportedly made by defendant Woodard.

The Sheriff, the Chief Deputy Sheriff, Captain Normand, and the Jailer had all testified that they had standing orders that the "maximum security cell" in the Avoyelles Parish Jail, in which the two (2) defendants and Billy Frazier were incarcerated at the time Reverend Bell testified that he went up to the Jail, was kept closed and locked and that occupants were not allowed to go in or out of the cell. As a matter of fact their food was handed to them through an opening in the iron door. It was clear from the testimony of the officers testifying as to the maximum security cell that in view of the fact that the door was kept closed at all times and the defendants and occupants were not allowed to go in and out of the cell that Reverend Bell could not have seen the three (3) individuals in the cell and could not have determined, from the position where he was standing, who made the statement referred to and to which he testified.

It was not until after the trial of the case that counsel for defendants were advised that the toilet facilities in the Jail Cell where defendants were incarcerated had been

removed just a short time before the trial of the case; or to put it another way, that at the time defendants were incarcerated in the maximum security cell **there were toilet facilities present** and accordingly, the District Attorney was laying before the Jury by his remarks, an insinuation of a non-existent condition contrary to the testimony of the State's own witness.

The evidence adduced in connection with the Motion to Set Aside the Verdict and for a New Trial revealed that the Special Assistant District Attorney knew that the toilet facilities had been removed just a short time before the trial, having been told this by Captain Normand of the Avoyelles Parish Sheriff's Department, and the Special Assistant District Attorney admitted on cross-examination that he did not convey this information to the District Attorney even though he had this information prior to the time the District Attorney made the quoted remarks complained of in this Bill.

On the hearing of the Motion to set Aside the Verdict and for a New Trial, Captain Normand testified that he also told the District Attorney himself, that the toilet had been removed just a short time before the trial. It was this testimony that the District Attorney branded as "an unmitigated lie" when he took the witness stand at the hearing of the Motion.

When the toilets were removed from the maximum security cell, the defendants were not incarcerated therein nor were they incarcerated in that particular cell at the time of the trial when the Jury went up to the Jail to view the maximum security cell. The accused were in the maximum security cell shortly after their arrest and also on the morning when Reverend Bell testified that he went up to the Parish Jail and overheard the remark referred to.

Sometime later the accused were moved to another cell in which they remained up until the time of the trial. Since the District Attorney made the remarks to the Jury implying that there were toilet facilities in the maximum security cell while they were occupying that cell, on rebuttal, defense counsel had no way to call this to the attention of the Jury. Consequently, this was made an issue in the Motion for a New Trial.

What then is essentially involved is the credibility of the witness Reverend Bell and the suppression of evidence impeaching that credibility by the prosecution as well as the aggravated factor of the compounding of the prejudice by the remarks of the prosecutor fortifying Bell's credibility by a false inference of facts. In *Napue v. Illinois*, 360 U.S. at 269, 79 S. Ct. at 1177, this Court held that a conviction must fall under the Fourteenth Amendment when the prosecution "although not soliciting false evidence, allows it to go uncorrected when it appears" even though the testimony may be relevant only to the credibility of a witness.

The United States Supreme Court has stated as follows:

> "We now hold that the suppression of the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady vs. Maryland*, 373 U.S. 83, 87.

The United States Court of Appeals for the Fifth Circuit, in a habeas corpus matter arising out of a state conviction dealt with the same problem.

There, the state had knowledge that a psychiatrist and psychologist, engaged by it had rendered opinions that

the defendants were legally incompetent. The State, however, did not inform the defense of these opinions. The Court phrased the problem as follows:

> " . . . whether the failure of the District Attorney to disclose to appellant's counsel the fact, known to him, of the existence of opinions arrived at by specialists engaged by the State favorable to the accused if known in time for them to plan the strategy of, and conduct, their trial is such denial of due process to invalidate the trial." *Ashley v. Texas*, 310 F. 2d 80, 83.

The Court, through Chief Judge Tuttle, held that due process was denied stating the following:

> "We conclude that without any such expression from the trial counsel that the fact of the opinions of Drs. Crowe and Tracktir, favorable to the defendants, is of such vital significance to the accused persons in planning and conducting their defense, the failure of the District Attorney to inform their counsel of this fact amounts to such fundamental unfairness in the trial of a criminal case as to amount to a denial of due process. *Ashley v. Texas*, *supra*, at p. 85.

It should be noted, however, that the rule that the State must come forward with evidence favorable to the accused, together with the names of witnesses, has long been in existence. Indeed, it is even present in the Canons of Ethics of the Louisiana and American Bar Association. The basic reason for the rule is also expressed therein.

The Canon provides as follows:

> "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence

> of the accused is highly reprehensible. Section 5, Article XIV, Articles of Incorporation, Louisiana State Bar Association printed at West's La. R.S., Vol. 21A (Title 37), page 165, 1964 ed. The Canon is the same as Canon 5, Canon of Ethics, American Bar Association."

Therefore, under both the law and rules of ethics, it is respectfully submitted that the District Attorney has a duty to furnish to the defendant information potentially favorable to him.

There are a plethora of opinions on the same point—that of the duty of the prosecution to come forward with evidence so that not only may a fair trial be held at the time of trial, but that the defense may adequately prepare its case, as set forth in *Ashley v. Texas, supra.*

It is urged that decisions in Federal courts have well established that suppression of evidence by the prosecution constitutes a denial of due process of law. See *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791; *Pyle v. State of Kansas*, 317 U.S. 213, 63 S. Ct. 177, 87 L. Ed. 214; *Alcorta v. State of Texas*, 355 U.S. 28, ___ S. Ct. 103, 2 L. Ed. 2d 9; *Napue v. People of State of Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217; *Miller v. Pate*, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690; compare United States ex rel. *Almeida v. Baldi*, 3 Cir., 195 F. 2d 815, 33 A.L.R. 2d 1407; United States ex rel. *Thompson v. Dye*, 3 Cir., 221 F. 2d 763; *Barbee v. Warden*, 4 Cir., 331 F. 2d 842.

More recently, this Court in *Giles v. Maryland*, 386 U.S. 75, 87 S. St. 793 (1967), applying the *Napue* case reversed and remanded for further proceedings a conviction where the prosecution had suppressed evidence which had bearing on the credibility of a prosecution witness.

The suppression of the evidence by the prosecution can best be understood when it is viewed in connection with the prosecution telling the jury on three occasions during the course its argument that it had pictures that the jury could not see because of defense objections. Similarly, the prosecutor displayed to the jury, as set out in the statement of facts, the clothing of one defendant and argued to the jury about a model both of which had been excluded from the evidence. It is obvious that the prosecutor is then asking the jury to convict not on the evidence presented to them but on the excluded evidence. This clearly violated the due process provision of the Fourteenth Amendment and denies petitioners their fundamental right to a fair trial.

If there can be any doubt that the prosecutor had a personal interest in the prosecution in conflict with the fair administration of justice then that doubt should subside when it is considered that the district attorney was a witness and testified several times for the state.

Before we enter into a discussion of the objection made to the District Attorney's testifying as a State's witness on material issues, we should like to point out that the District Attorney, by his own statement, at the time the Motion to Suppress was being heard, stated that he would probably be a witness later on but declined to testify when he was called by the defendants in connection with the hearing on the Motion to Suppress. It is obvious that the District Attorney knew at that time (when the Motion to Suppress was being heard) and before trial, that he would take the witness stand during the trial. This being the case, we respectfully submit that propriety required the District Attorney to recuse himself so as to bring himself within the principles enunciated by the various authorities which we shall cite hereinafter.

The District Attorney is competent to testify as to material facts within his knowledge. *Butler v. State*, 97 N.E. 242.

It has also been said that it is within the discretion of the Trial Judge to allow the prosecutor to testify. *Butler vs. State, supra.*

If the prosecuting attorney knew that it was necessary for him to become a witness, other counsel should be engaged in the case. *Ziegler vs. State*, 203 N.W. 872 (Wisconsin, 1926); *United States vs. Buono*, 247 F. 2d 838, 2nd Circuit 1957; *Robinson vs. United States*, 32 F. 2d 505; *Macon vs. Commonwealth*, 46 S.E. 2d 396; *Turner vs. State*, 55 So. 2d 228; *Mound vs. State*, 48 So. 2d 553.

In *State vs. Davis*, 164 So. 2d 589, the Court did not have before it the issue of a District Attorney testifying as a witness, but rather the question of the District Attorney making certain remarks to the jury in argument when he had not been anything but a spectator throughout the trial. In making the following statement which we quote from the Davis decision, The Louisiana Supreme Court stated the rationale for disallowing District Attorneys being both prosecutor and material witness in the same case:

> "Finally, to compound the injury and further prejudice the jury, the District Attorney, who did not try the case but was in the courtroom throughout the trial as a spectator, added his personal prestige, as well as the weight of his office, in the scales against the defendant, by making the following special plea to the jury in closing:
>
> > "Now in this case the only thing you've got to look for, the only thing in my opinion which is important, is whether or not you're going to

> believe the duly constituted law officials of the parish, including my own assistant, or whether or not you are going to believe this man, who through his own admission and who through cross-examination is a convicted criminal. That's what you've got to decide in this case and that's the only question you've got to decide."

Unquestionably the District Attorney in the instant case in taking the witness stand repeatedly to bolster the testimony of the State's case generally, did exactly what was condemned in *State vs. Davis, supra.*

In *Macon vs. Commonwealth, supra,* the defendant was charged with murder, found guilty of manslaughter and the conviction reversed. In the concurring opinion in *Macon* it was said:

> "I think his conduct of the trial however was fairly subject to criticism. There was a conflict between the Sheriff and the defendant as to what happened. The *Commonwealth* attorney was present on all the occasions the Sheriff testified about. He became a material witness to these transactions. When that situation developed he should have retired from the case and another should have been appointed to prosecute. Instead **by his method of questioning** he was able to impress upon the jury that he vouched for all the Sheriff said and by the same means he contradicted the defendant in his cross-examination of her. This is accomplished without being sworn as a witness and without submitting himself to cross-examination. This procedure was unfair to the defendant."

In *Macon* the Court condemned the District Attorney's throwing himself into the scales of justice by his method of examination and cross-examination. In *Macon* he was

not even a witness but still the Court disapproved of the method used to put over to the jury his personal belief or opinion.

In *Turner vs. State*, 55 So. 2d 228, the Supreme Court of Mississippi held that it was reversible error to permit the District Attorney to testify against the defendant over objection:

> "In the petition to correct a mistake in a decree filed in the Chancery Court which was attached to and made a part of the plea in abatement, it is stated that the District Attorney represented Christine Hill Turner, the first wife of appellant in a divorce proceeding and that the decree was rendered on February 6, 1950 and not on February 7, 1950. We are of the opinion that the **District Attorney** having participated in this proceeding **should have foreseen that more than likely he would be called upon to testify** and that **he should have withdrawn from the prosecution or refrained from testifying.**" (Quoting *Adams vs. States*, 30 So. 2d 593.)

In *Adams v. State*, (a Mississippi case) 30 So. 2d 593, the District Attorney participated in the search of premises involved in the prosecution of illegal possession and sale of intoxicating liquor and thereafter acted as prosecutor in the case. The Supreme Court of Mississippi held that it was reversible error to permit the District Attorney to act as witness and prosecutor.

In the case of *Jenkins vs. State*, 136 So. 2d 580, another Mississippi case, the prosecuting attorney testified that he had purchased whiskey from the defendant and also identified the defendant. The Court held that to permit a county attorney to act as prosecutor for the State and testify as a prosecuting witness constituted reversible error. In so deciding the Court in *Jenkins* said:

"* * * in conducting a criminal case the prosecuting attorney must be fair and impartial and see that defendant is not deprived of any constitutional or statutory right. Section 42 C., 18 C.J. 1314:27 C.J.S. 'District and Prosecuting Attorneys' Section 14. In this connection the authorities agree that the District Attorney is a quasi-judicial officer. Appeal of *Nicely, et al*, 130 PA. 261, 18 A. 737. In discussing this phase of the prosecuting attorney's duties, the Supreme Court of Oregon held that it is as much the duty of prosecuting attorneys to see that a person on trial is not deprived of any of his constitutional or statutory rights as it is to prosecute him for the crime with which he is being charged. *State vs. Osborn*, 54 Or. 289, 103 P. 62, 20 Ann. Cas. 627."

"The very nature of his function as a prosecutor necessitates that the District Attorney be a partisan in the case. Zeal in the prosecution of criminal cases is a praiseworthy and commendable trait in such an officer and not to be condemned by anyone. A fearless and earnest prosecuting attorney within the limitations upon his powers and perogatives is a bulwark to the peace, safety and happiness of the people. If convinced of the defendants guilt he should in an honorable way use every power that he has to secure his conviction. At the same time it is the duty of the prosecuting attorney who represents all the people and has no responsibility except fairly to discharge his duty, to hold himself under proper restraint and avoid violent partisanship, partiality and misconduct which may tend to deprive the defendant of the fair trial to which he is entitled. * * * it is the duty of the prosecutor to see that nothing but competent evidence is submitted to the jury; * * * 42 Am. Jur. Sec. 20, page 255."

The *Jenkins* case citing the *Adams* case went on to state the rule which we feel is prevalent in the United

States and which should have been followed in the instant case, which is as follows:

> "As to the eligibility of a District Attorney to be a witness for the State, in a case he is prosecuting, the general rule is that 'although a prosecuting attorney is competent to testify, his testifying is not approved by the Courts except where it is made necessary by the circumstances of the case, and, if he knows before the trial that he will be a necessary witness, he should withdraw and have other counsel prosecute the case. The propriety of allowing the prosecutor to testify is a matter largely within the Trial Court's discretion.' 70 C.J. 183, Sec. 247. We have a statute Section 3924, Code 1942, dealing as stated, *supra*, with pro tempore appointments of District Attorneys when the duly commissioned incumbent is absent or disqualified. It provides that 'the Court shall forthwith appoint some attorney at law to act for the State in the place of the District Attorney during his absence or inability or disqualification * * *'. We repeat that we think that the Trial Court was in error when the District Attorney was permitted to testify over objection of appellant, under the circumstances, where he was also acting as the prosecutor in the case."

In *Robinson vs. United States*, 32 Fed. 2d 505, the Assistant United States Attorney became a witness to rebut whether defendant was a witness in the case of *United States vs. Marsh* (a criminal proceeding). The Court stated:

> "Mr. Berwster, Assistant United States Attorney, became a witness on rebuttal to a most important and essential matter in the case, viz. whether or not defendant was a witness in the case of *United States vs Marsh* (a criminal proceeding), at the time he received the alleged bribe. No hard and fast

rule can be laid down as to when it is permissible for a prosecuting attorney to become a witness against the defendant and remain as prosecutor. Circumstances might arise in the trial of a case making it necessary that the prosecuting attorney or his assistant become a witness but these cases are few and exceptional. The function of a prosecuting attorney far greater weight than to that of the ordinary witness. Circumstances might exist where the prosecutor could not withdraw from the case. He might be the only attorney familiar with the case, and the only one engaged in the prosecution. The tendency of a situation where a prosecutor in a criminal case becomes a witness for the government is to prevent whatever that fair trial to which a defendant is entitled. If this were the only question in the case it might not be sufficient to warrant a reversal, but the practice of acting as prosecutor and witness is not to be approved, and should not be indulged in, **except under most extraordinary circumstances.** Here there were other counsel engaged in the case and Mr. Brewster could, we assume, have withdrawn without imperiling the Government's case when it was discovered that he was the necessary witness."

In *United States vs. Buono, supra,* the Assistant United States Attorney became a witness in order to contradict and impeach one of the United States witnesses. The Court in this case again deplored the practice of a Government prosecutor so injecting himself into the trial of a case unless doing so was unavoidable.

In *Ziegler vs. State, supra,* the Supreme Court of Wisconsin had for consideration an oral confession purportedly made to the District Attorney and the District Attorney later testified as to this confession in Court. The Court stated:

"The staetments made by the defendant to the District Attorney were freely and voluntarily made and were admissible in evidence."

"But we must deplore the practice indulged by the District Attorney in offering himself as a witness while he was in the active charge of the prosecution. This practice offends against the cannon of ethics of the American Bar Association which we said in *Royes vs. First National Bank*, 183 Wis. P. 21, 197 N.W. 237, states ethical considerations which must appeal to every lawyer as being sound. If such practice is to be discouraged in a civil case, certainly it is to be deplored in a criminal case. A District Attorney is a quasi-judicial officer and he should emulate the highest ethics of his profession. If he finds that the interest of justice requires him to testify in a criminal case he should withdraw from the active prosecution of the case and ask the Court to appoint some other attorney to perform the duties of a District Attorney in the trial of such case, under the provisions of Section 5944, Stats."

In *Butler vs. State, supra*, an Assistant Prosecutor was called as a rebuttal witness and his testimony was allowed. The facts in this case illustrates the situation where the District Attorney is not only competent to testify but had to become a witness for the State because of a situation that he could not anticipate in advance or he could not have known about in advance of the trial.

In the instant case, none of the extraordinary circumstances which would properly permit the District Attorney to become a witness in a case in which he was prosecuting existed. The District Attorney in the instant case knew well in advance as to what Chief of Police Dubea and other law enforcement officers' were going to testify to and he

did or should have fully realized in view of the pretrial pleadings filed by the defendants that the purported statements made by the defendants would be under attack on various statutory and constitutional grounds and generally he knew that he must at some time or other be a witness in the case. Under Louisiana Law there is ample provision made for substitute prosecutors. In view of all of these circumstances the District Attorney in this case had no valid reason to be both prosecutor and material witness for the State and the Court, in permitting him to testify time and again, more closely weaved the threads of errors during the course of this trial ultimately resulting in what we respectfully submit was not a fair and impartial trial and which denied to the accused their rights under due process of law.

Considering the totality of the circumstances the petitioners were effectively denied their right to a fair trial.

Part II. Severance

At the time of trial of the defendants Louisiana law provided in L.R.S. 15:316 (now repealed and replaced) that "Persons jointly indicted shall be jointly tried, unless the district attorney elect to place such persons separately upon trial, or unless the court, upon motion of defendant, shall, after a hearing contradictory with the district attorney, order a severance." However, since former L.R.S. 15:316 did not set any standards for the exercise of such authority, the Louisiana Supreme Court had to supply what is commonly known as the "antagonistic defenses" tests. Louisiana Courts have traditionally recited the proposition that:

> "It is true that where defenses are antagonistic and where confessions of each of the defendants incrimi-

> nate the other and it is intended to use such confessions in evidence, a severance should be granted . . . *State v. Cook*, 215 La. 163, 39 So. 2d 898 at 900 (1949).

This has caused the Reporter to the Louisiana Code of Criminal Procedure (effective January 1, 1967 — after date of trial) to state in the Official Revision Comment to Article 704 (replacing former LRS 15:316) that:

> "If a confession was made by A that the state intended to use against A, and it implicated B, then B could obtain a severance. (citations omitted). The reason for this rule was that the effect of the confession of A would be to permit A to testify against B without being subject to cross-examination."

> "A defendant was entitled to a severance if a co-defendant wished to use the former's testimony, since that would be impossible if they were tried together. (citations omitted). However, under R.S. 15:461 (3), a co-defendant can not without his consent be called, unless the former can get a severance from his co-defendant. Even if there is a severance, the co-defendant might still refuse to testify on the ground that his testimony might incriminate him. In that case, however, the defendant would have, for what is was worth, the benefit of his former co-defendant's refusal to testify." (West's Louisiana Statutes Annotated, Code of Criminal Procedure, Volume 2, page 283.)

Although the Louisiana jurisprudence is legion that antagonistic defenses and confessions by plural defendants mutually implicating each other are grounds for a severance, the simple fact is that this is a right recognized in

theory but denied in practice. See *State vs. Prague*, 243 La. 337, 144 So. 2d 352; *State vs. Cook*, 215 La. 163, 39 So. 2d 898 (1949); *State vs. Faciane*, 233 La. 1028, 99 So. 2d 333; *State v. Brazile*, 75 So. 2d 856; *State vs. Mack*, 243 La. 369, 144 So. 2d 363, cert. denied, 373 U.S. 917; *State vs. Birbiglia*, 149 La. 4, 88 So. 533 (1924); *State vs. Lamotte*, 168 La. 837, 123 So. 591 (1929); *State vs. Goury*, 184 La. 955, 168 So. 113 (1936); *State vs. Livesey*, 190 La. 474, 182 So. 576 (1938).

In the instant case, counsel for the state contended in its brief at page 15, and the Louisiana Supreme Court at 203 So. 2d 243 quoted approvingly from an earlier case, the proposition that an accused is not entitled to a severance as a matter of right and that the granting or refusal of a severance rests **entirely** within the discretion of the trial judge unless manifestly erroneous and arbitrary to the accused. It is respectfully submitted to Your Honors that the denial of severance in this case was arbitrary, manifestly erroneous and injurious to each of the accused for the reasons, among others, that the effect of such statements in this case was to permit each defendant to testify against the other without the benefit of cross-examination and without either having taken the witness stand in the trial.

Each defendant has challenged the right of the State to admit his statements or confession against **him individually,** and still urges that position. The issue here goes beyond that. It raises the question whether a jury should be permitted to hear the unsworn statement of a person other than the accused which is not subject to the truth testing qualities of confrontation and cross-examination. We are here concerned with very fundamental and basic constitutional rights. In *Pointer vs. State of Texas*,

380 U.S. 400, 403, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, this Court held that the Sixth Amendment right of an accused to confront the witnesses against him is a "fundamental right * * * made obligatory on the States by the Fourteenth Amendment." Confrontation of a witness is equivalent to cross-examination under oath in court. As this Court pointed out in *Pointer vs. Texas*, "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." 380 U.S., at 404, 85 S. Ct., at 1068. The seriousness of such a denial was made clear by this Court more recently wherein it stated, "(A) denial of cross-examination without waiver * * * would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart vs. Janis*, 384 U.S. 1, 3, 86 S. Ct. 1245, 1246, 16 L. Ed. 2d 314.

In this case there was certainly no waiver of the right of each defendant to exclude the statements of the co-defendant implicating him. Each filed a severance for that very reason — so that the admission of the co-defendant would not be heard by the jury in his trial and each reserved Bills of Exception to the trial judge's denial of these motions. Notwithstanding, the fact that the *Brookhart* case holds that no amount of showing of want of prejudice can cure a denial of right to cross-examination, the Louisiana Supreme Court, in its written opinion in reference to this issue stated at 203 So. 2d 243, 244, "We do not find that either defendant was arbitrarily affected by the ruling of the trial judge, or that either actually **suffered any prejudice** from a joint trial itself." Thus, in this instant case the Louisiana Supreme Court is not applying the standards announced by the United States Supreme Court in the *Brookhart* case. The issue

is not whether prejudice can be shown but rather whether the admission of the confessions of jointly tried defendants, neither of whom testify, constitutes denial of the right to confrontation and cross-examination of witnesses when the confessions implicate a defendant other than the one confessing. If it does, then under the *Pointer* case and the *Brookhart* case, defendants have been denied fundamental rights under the Sixth and Fourteenth Amendments of the United States Constitution irrespective of a showing of prejudice. These rights are so basic and fundamental to a fair trial that in a recent case where there was only a partial denial of the right of cross-examination, this Court reversed a conviction where the only thing the witness would not answer was his correct name and address. *Smith vs. State of Illinois*, ___ U.S. ___, 88 S. Ct. 748 (1968).

In view of the fact that each of the confessions implicating the co-defendants were admitted into evidence and in view of the fact that the foregoing authority and cases show that the admission of this damaging hearsay testimony was in violation of the fundamental rights of the respective accuseds individually, then on what rational basis did the trial judge, and thereafter, the Louisiana Supreme Court, deny the motion for severance and affirm the conviction? It appears from the opinion of the Louisiana Supreme Court at 203 So. 2d 243, note 8 that it was on the basis that the trial judge instructed the jury:

> "And, in the case of a confession, made outside of Court, by one defendant, it should not be considered by the jury as evidence against the other defendant who was **not present** or not a **party to such confession.**

* * * * *

> "Although there are two defendants and they are jointly charged with the same crime, it is your duty, Gentlemen of the Jury, to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze **what the evidence** shows with respect to that individual, leaving out consideration, entirely, any evidence admitted solely against some other defendant, each defendant is entitled to have his case determined from his own acts and statements, and the other evidence in the case as may be applicable to him."

A juror is not a tape recorder and, notwithstanding, a cautionary jury instruction, cannot erase from his mind the contents of a co-defendant's illegally admitted statement.

Even if it were conceded or held that instructions to a jury could have curative effects where an accused's fundamental rights under the Sixth and Fourteenth Amendment of the Constitution are violated, it would nonetheless be apparent that this instruction is sufficiently vague, with inaccuracies of such an extent, that it affords no genuine protection. A juror hearing such instruction could well assume that a confession made in the presence of the other defendant is admissible against both or that by being mentioned in the confession the co-defendant becomes a **party** to the confession. Such is not the case and this was never made sufficiently clear to the jury.

Petitioners respectfully urge to this Court that no amount of instruction to a jury can remove from the minds of a lay jury unschooled in the law the damaging and prejudicial effect of such evidence. Consider for a moment the effect of such a rule in the case of *Smith vs. Illinois*. Could the jury have been merely instructed to disregard

the testimony of the witness if full cross-examination were not permitted? This would have the effect of destroying the safeguards of the function of the judge who has a prime duty to insure the defendant a fair trial by excluding certain evidence that does not meet judicial and constitutional standards. It is these very safeguards which were preserved by this Court in *Jackson vs. Denno*, 378 U.S. 368, when this Court held that a defendant was constitutionally entitled to have a trial judge to determine the admissibility of a confession before it was heard by the jury which could probably not separate the issue of the voluntariness of an extra judicial statement from the issue of its truth. By logical implication the jury might rely on an unconstitutional statement because the jury is unable to expurge the statements and disregard them entirely once having heard them.

We urge the Court's attention to the review which appeared in Volume 24, No. 19 of the United States Law Week (34 L.W. 2261 "Criminal Law and Procedure") which reads as follows:

> "California defendant's confession that inculpates co-defendant cannot be used at joint trial even if it is admissible against the defendant and jury is instructed not to consider it against co-defendant."
>
> "In *Jackson vs. Denno*, 378 U.S. 368, 32 L.W. 4620, the Court held that a defendant was constitutionally entitled to have a trial judge or possibly a separate jury determine that his confession was voluntary before it was submitted to the trial jury for an assessment of its credibility. The Court did not believe that a jury could separate the issue of the voluntariness of an extra-judicial statement from the issue of its truth."
>
> "Although *Jackson* was directly concerned with

obviating any risk that the jury might rely on an unconstitutionally obtained confession, its logic extends to obviating the risk that the jury may rely on any inadmissible statements. If it is a denial of due process to rely on a jury's presumed ability to disregard the involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a co-defendant's confession implicating another defendant when it is determining that defendant's guilt or innocence."

"In joint trials when the admissible confession of one defendant inculpates another, and a confession is not deleted from the case, the jury is expected to perform the overwhelming task of considerating it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any co-defendants of the declarant. A jury cannot segregate evidence into separate intellectual boxes. It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed these same criminal acts with A."

"Whether or not the practice is constitutionally permissible, it is prejudicial and unfair to the non-declarant defendant and must be altered. In the absence, however, of a holding by the United States Supreme Court that the due process clause requires such change, the rules this Court now adopts ought to be regarded not as constitutionally compelled but as judicially declared rules of practice."

"When the prosecution proposes to introduce into evidence an extra-judicial statement of one defendant that implicates a co-defendant, the trial court must adopt the one of the following procedures:

1) It can permit a joint trial if all parts of the extra-judicial statement implicating any co-defend-

ants can be and are effectively deleted without prejudice to the declarant. By effective deletions we mean not only direct and indirect identification of co-defendants but any statements that could be employed against non-declarant co-defendants once their identity is otherwise established.

2) It can grant a severance of trial if the prosecution insists that it must use extra-judicial statements and it appears that effective deletions cannot be made.

3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extra-judicial statement implicating a co-defendant, the trial court must exclude it if effective deletions are not possible. Similar rules concerning joint trial have been adopted in other jurisdictions and have been found workable. Traynor, Ch. J. Calif. Sup. Ct. *People v. Aranda*, 11-12-65."

In the instant case, after the Motion to Suppress the purported statements of the defendants was overruled by the Court, counsel for defendants filed a Motion for Severance on behalf of **each** defendant and the Court likewise overruled each of these motions, thereby forcing the defendants to go to trial together. The court well knew, as did the prosecution that in the event of a joint trial, the purported statements of both of the accused would be sought to be introduced into evidence despite the prejudicial effect of the statements to the defendants inter sese.

Although this Court, in *Delli Paoli vs. United States*, 352 U.S. 232, (1957) in a 5-4 decision, upheld a conviction of a defendant who was alleged to have been prejudiced by the admission into evidence of a confession by a co-defendant naming him, that case was in the opinion of the majority atypical for a number of reasons one of which

distinguishes it from the instant case. There was no pretrial motion for severance in *Delli Paoli* whereas there was an individual motion for severance by each petitioner in the instant case.

The continued vitality of the *Delli Paoli* decision is at least questionable in light of the Supreme Court's later decision in *Jackson vs. Denno*, 378 U.S. 368 (1964), holding that defendant was constitutionally entitled to have a trial judge determine that his confession was voluntary before it was submitted to the trial jury for an assessment of its credibility. In *Jackson* the majority quoted from the dissent in *Delli Paoli* to the effect that a jury should not be permitted to be influenced by evidence that as a matter of law they cannot consider but as a matter of fact they cannot disregard. 378 U.S. 368, 433-36 (1964). It has been suggested that "because of these close parallels between *Jackson* and *Delli Paoli*, *Jackson* may foreshadow a holding that the *Delli Paoli* procedure violates due process." *The Supreme Court, 1963 Term*, 78 Harv. L. Rev. 179, 213 (1964).

Part III. Unreasonable and Unconsented Interception of Conversation

The statement attributed to Woodard and which Reverend Bell testified he overheard could not have but had an effect on the jury. It was the only evidence purporting to show actual malice on the part of either defendant. Self defense was a major contention in this case and the evidence established that the first blow was struck by the deceased with a glass which severely cut one of the petitioners. All other statements (although argued to by inadmissible by petitioners) did not show the kind of malice or culpability as did the partial statement allegedly overheard by Reverend Bell. It is submitted that the burden

is upon the prosecution to show all of the circumstances surrounding an alleged inculpatory statement or confession and that the prosecution has failed to carry that burden in this type of case and must necessarily have failed in every case where it does not even purport to have heard the entire statement or even know that the statement was a complete thought or sentence.

Allowing this testimony to go to the Jury constituted prejudicial error which would warrant reversal of the conviction.

In view of the purported status of the witness, that of a Minister of the Gospel, it can readily be understood that what he testified to would have great weight with the Jury. It seems extremely odd to us why a Minister of the Gospel would go to the Jail to render spiritual help to prisoners and then when he overheard a remark (as he claims to have overheard) he would become angry, as he testified he did, and leave the Jail in a huff, and then tell the District Attorney about it two days later. However, be that as it may, we submit that the laws applicable to this situation certainly warrants a finding of reversible error in view of what is provided in Louisiana Revised Statutes 15:450 whichis as follows:

> "Every confession, admission or declaration sought to be used against anyone must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford."

The Bills of Exception here under discussion as well as the record related thereto show unquestionably that the incriminating portion of what the witness claimed to have heard was allowed to go to the Jury and admittedly the

witness did not remember nor could he testify as to what preceded or what followed the particularly incriminating statement.

In reversing a conviction for murder on the basis of a similar situation, in *State of Louisiana vs. Edward Hughes*, 29 La. Ann. 514, the Louisiana Supreme Court said:

> "First — Thomas McMahon, a state witness, was asked by the District Attorney to state a conversation he had with the prisoner relative to the homicide charge. The witness there upon saying that he had had such conversation with the prisoner but that he could not remember said conversation, nor the substance thereof, the District Attorney thereupon asked said witness to state to the Jury what he could remember or what the prisoner had said in said conversation. The prisoner objected 'on the ground that the confession or declaration of the prisoner must be taken together and that such confessions or declarations were inadmissible unless it appears that the witness can state at least the substance of said conversation'. The Court overruled the objection and allowed the witness 'to testify as to such portion of said conversation as he could remember' stating to the Jury that the prisoner's objection 'went not so much to the admissibility as to the effect of the testimony'."
>
> Second — the witness Landry sworn for the State was asked whether he had ever heard any statements made by the accused and "if so, what statements he had heard". "The witness stated that **he had overheard a remark made by the accused from the Jail window in the course of a conversation which he,** (the accused) **was carrying on with a little boy outside;** that though he had noticed these parties in the conversation before he arrived at the jail, and had left them in conversation, **he had only**

heard the single remark to which he testified while he was passing by the jail and that **he had not heard either the preceding or subsequent portion of the conversation** of which this remark formed part." The accused made the same objection and the Court overruled it for the same reason'.

"We think the Court below erred in both these rulings. An admission, confession or declaration of a party cannot be given in evidence against him unless the witness testifying thereto can at least state the substance of all that was said. (Citations and Authorities)."

"We are not disposed to relax this salutary rule; for although such evidence, when we have satisfactory guarantees of its accuracy, may amount to the strongest proof, yet in the majority of instances, owing to infirmatives of memory, or to inattention, or misunderstanding in those called to state conversations with others, it is not very trustworthy. It would be utterly unreliable if fragmentary portions of conversations were received, for then a man might be made to say directly the contrary of what he did say."

We respectfully submit that the cited case is directly on all fours with the situation reflected by Bills No. 46 and 47, and should be the basis for reversal of this conviction just as it was in *Hughes*.

In addition to the fact that the partial or fragmented incriminatory statement is inadmissible per se, it is also urged that this Court should hold it inadmissable because of the matter and circumstances under which it was obtained.

It is urged that it is an error of constitutional dimensions to permit Reverend John Bell to testify at the trial as to petitioner Woodard's incriminating statements which

Reverend Bell allegedly overheard under the circumstances disclosed in the record. The use of statements obtained from an accused **without his knowledge** that they are being obtained for use against him at trial after his arrest and having been charged with an offense (by simple booking) violates the accused's Fifth and Sixth Amendment. Petitioners' Fifth and Sixth Amendment rights were violated by the admission of this statement because (1) he had been formally arrested and was being held in jail without bail, (2) he had not been furnished the services of an attorney nor had he obtained an attorney at the time the statements were allegedly made, (3) he had not been cautioned nor adequately warned of his rights under the *Escabedo* or *Miranda* decisions, nor had he intentionally and effectively waived such rights, (4) he did not know that his statement (or a portion of it) was being overhead, and (5) he intended that his conversation be private and did not waive his constitutional right to be secure against unreasonable searches or surveillance during his incarceration.

Although factually distinguishable, the instant case in terms of Constitutional issues is similar to *Massiah v. United States*, 377 U.S. 207, 84 S. Ct. 1199 (1964). In the *Massiah* case, this Court ruled inadmissible a confession freely and voluntarily made to a confederate by a defendant after indictment and while free on bail. This Court at 84 S. Ct. 1203 in *Massiah* said:

> "We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel. It is true that in the Spano case the defendant was interrogated in a police station, while here the damaging testimony was elicited from the defendant without his

> knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals, 'if such a rule is to have any efficacy it must apply to **indirect** or **surreptitious** interrogations **as well** as those conducted in **the jailhouse.** In this case, Massiah was more seriously imposed upon * * * because he **did not even know** that he was under interrogation by a government agent'." 307 F. 2d at 72-73.

Also in *Massiah* this Court quoted approvingly from a New York case the proposition that:

> "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime. *People v. Waterman*, 9 N.Y. 2d 561, 565, 216 N.Y. S. 2d 70, 75 175 N.E. 2d 445, 448."

It is true that the *Massiah* case and the *Waterman* case deal with interrogations or incriminating statements after indictment and the instant case does not. It is submitted, however, that there is no real difference when you consider that the petitioners in the instant case were charged by booking and were in fact being held without bond. If anything their need for counsel was greater than that of the defendant in *Massiah* who was admitted to bail. By now it is abundantly clear that the right to counsel exists from the moment of arrest. *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

Although this Court declined to consider the contention in the *Massiah* case that Fourth Amendment rights were involved and chose to base its holding on the Fifth

Amendment and Sixth Amendment, this Court did have before it similar issues in *Katz v. United States*, 88 S. Ct. 507 (1967) and excluded electronically recorded statements of the accused **prior** to his arrest. With regard to the scope of the Fourth Amendment protection this Court in *Katz* said:

> "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis v. United States*, 385 U.S. 206, 210, 87 S. Ct. 424, 427, 17 L. Ed. 2d 312; *United States v. Lee*, 274 U.S. 559, 563, 47 S. Ct. 746, 748, 71 L. Ed. 1202. But what he **seeks to preserve as private,** even in an area accessible to the public, may be constitutionally protected. See *Rios vs. United States*, 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688; Ex parte Jackson, 96 U.S. 727, 733, 24 L. Ed. 877". 88 S. Ct. 511.
>
> * * * * *
>
> "These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room, to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." 88 S. Ct. 515.

An application of the *Katz* case is warranted and the facts of the record clearly disclose that the petitioner Woodard did not willfully or knowingly disclose to the public the contents and nature of his **private** conversation in his cell with Billy Frazier, if indeed such a conversation occurred. (Frazier testified it did not).

Inasmuch as petitioner Woodard did not waive his Fourth Amendment rights under the *Katz* case by his

private conversation, while incarcerated, and inasmuch as *Massiah* precludes the use of incriminatory statements by the accused after the adversary procedure begins without his knowledge that they are being obtained for that purpose or without consent of his counsel, the admission into evidence of the testimony of Reverend Bell as to what he thought he heard violated the Fourth, Fifth and Sixth Amendment rights of the accused.

Part IV. Confessions

A. Whether confession admissible.

On the trial of the case timely objections were made to the introduction into evidence of the purported statements of the accused, the objections being set forth in Bill of Exception No. 24, Bill of Exception No. 25, Bill of Exception No. 27, Bill of Exception No. 38 and Bill of Exception No. 39. The additional objections were that the purported statements were obtained and made in violation of the defendants' statutory rights under Louisiana Revised Statutes 15:59, 60, 66, 67, 70, 77 and 78.

In the context of the operative facts and events from approximately 7:00 a.m. on Saturday, April 18th to approximately 8:30 a.m. on Sunday, April 19th, 1964 must be found answers to the following inquiries:

1) Was there a de facto arrest of the defendants at the Ranch House Motel?

2) Was their arrest lawful?

3) Were the defendants accorded their statutory and constitutional rights, privileges and immunities under the Constitution of the United States and the State of Louisiana?

4) Were the confessions or admissions purportedly made by the defendants (identified as "Movers'

Exhibits 8 and 9" in connection with the Motion to Suppress and "State Trial Exhibits 10 and 11" on the trial of the case "free and voluntary" as those terms have been defined and interpreted in the light of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

5) Were the purported confessions or admissions of the accused admissible in evidence even if the concept of voluntariness was satisfied?

Unquestionably the defendants were put under "arrest" at the Ranch House Motel without a warrant of arrest. Any detaining by an officer of another against his will, or any interference with freedom of movement, even for a short time, and even if the purpose is to investigate an alleged crime constitutes an arrest. Louisiana Revised Statutes 15:58; *Rhodes vs. Jordan*, 151 So. 811; *Berry vs. Bass*, 102 So. 76; *U. S. vs. Festa*, 192 F. Supp. 160; *Henry vs. U. S.*, 80 S. Ct. 168; *Hundley vs. Millner*, 114 F. Supp. 206; *Marton vs. U. S.*, 147 F. 2d 28.

The arrest of the accused was **not lawful** for the reason that it was not based on "reasonable cause" or "probable cause" as defined in the jurisprudence. At the time the accused were arrested there was no "reliable information" for a "creditable person" which would lead the police officers to reasonably believe that the accused had committed a crime. As a matter of fact, the basis of arrest made by Chief Dubea of the defendant Woodard could not even rise to the dignity of a "mere conclusion" which basis for an arrest was condemned in *Aguillar vs. Texas*, 84 S. Ct. 1509. At the time of Woodard's arrest there could not be even a **suspicion** or **belief** that he had committed any crime. Chief Dubea admitted that the only information he secured at the Pelican Club was a description of an

automobile and the license number of the car but made no investigation whatsoever. Coupled with this is the testimony of Major Henderson that there was no basis for "booking" Woodard and Hopper until after their interrogation at the Sheriff's Office. An examination of other cases in addition to *Aguillar* will reflect that the arrest of the accused was not lawful because not made on "probable cause". See the following:

> *Ker vs. California*, 83 S. Ct. 1623; *U. S. vs. Rincke*, 229 F. Supp. 132; *Pigg vs. U. S.*, 337 F. 2d 302; *State vs. Aias*, 149 So. 2d 400; *State vs. Calcione*, 149 So. 2d 417; *Mallory vs. U. S.*, 77 S. Ct. 1356; *Duncan vs. State of Mississippi*, 176 So. 2d 840.

Perhaps the most flagrant violation of the statutory rights of the accused is revealed by a consideration of Louisiana Revised Statute 15:77. In part, this statute provides as follows:

> "All persons arrested shall, **from the moment of their arrest**, be **entitled to confer with counsel**, shall not be placed in solitary confinement in any jail or precinct station and denied the right to confer with counsel. They shall be given the **right and privilege of using the telephone** in the jail or station or send a messenger for the purpose of communicating with counsel and with his friends and relatives for the purpose of securing counsel. They shall also have the **right and privilege of using the telephone** in the jail or station or send a messenger for the purpose of communication with any person, firm or corporation in order to secure their release by bail, parole and such person, firm or corporation contacted or communicated with shall have the right to visit said arrested person within a reasonable time if not charged with a crime in which no release or bail is allowed by law."
>
> "No peace officer or other person making an arrest

shall neglect, fail nor refuse to immediately conduct the person arrested to the nearest jail or police precinct station and immediately cause him to be booked. Such neglect or refusal shall be prima facie evidence of proof of violation of this section."

Cyrus Frazier testified that when he, Woodard and Hopper were together in the radio room at the Sheriff's Office shortly after being brought there, he, Frazier, asked Deputy McNeal if he could use the telephone. Frazier further testified that this request was denied. Deputy McNeal did not deny that any such request was made by Frazier, nor did he deny that the request was refused.

Additionally, as we have pointed out hereinabove, the constitutional rights, privileges and immunities of the accused as interpreted by the jurisprudence of the United States Supreme Court was unquestionably denied to them.

The confessions or admissions purportedly made by the defendants could not be said to be "free and voluntary" in the light of the totality of circumstances as revealed by the evidence which we have outlined above.

Even if the purported confessions or admissions of the accused fit the concept of voluntariness as defined by the jurisprudence, it should not have been admitted in evidence for the reason that it was secured during a period of unlawful detention. *Mallory vs. U.S., supra; Fahy v. Connecticut*, 84 S. Ct. 229; *Wong Sun vs. United States*, 83 S. Ct. 407; *State vs. Marchetti*, 173 So. 2d 531; *Mapp vs. Ohio*, 367 U.S. 643; *24 La. Law Review 340.*

Professor Pugh states in his article in Volume 24 at Page 343 of the Louisiana Law Review that the McNabb-Mallory rule has been rejected by the Louisiana courts. This statement, of course, was made prior to the Louisiana

Supreme Court's decision in *State vs. Davidson*, 177 So. 2d 273. It is respectfully submitted that the McNabb-Mallory rule should not continue to be rejected in the light of *Davidson* which imposes on a defendant in a Louisiana court prosecution the obligation to follow the Federal Rule with respect to Motions to Suppress evidence. It is further submitted that *Davidson* incorporates in the Louisiana rules of Criminal Procedure all the related exclusionary rules of the Federal Procedure.

If it should be argued by the State that it is the rule in Federal prosecution that confessions obtained during an illegal detention must be suppressed (*Mallory vs. United States, supra; McNabb vs. United States*, 318 U.S. 332) but that this exclusionary rule is a function of the supervisory power of the Federal courts over Federal prosecutions, and does not rise to the dignity of a constitutional prohibition, we should like to call the Court's attention to the recent ruling of The Louisiana Supreme Court in *State of Louisiana vs. Davidson, supra*, wherein the court imposed on defendants in Louisiana prosecutions the burden of following Federal rules with respect to Motions to Suppress. In *Davidson*, the court stated:

> "In any event we believe that since the exclusionary rule must be applied in all State criminal cases in accordance with edict in *Mapp vs. Ohio*, the procedural rights of the accused should also conform with the standard provided by the Federal Courts and that he should not be accorded by the Trial Courts of this State any less onerous procedure than he would have had if he had been tried before a Federal Court".

In view of the foregoing pronouncement by The Louisiana Supreme Court it would seem fair and logical to

apply the rule of *McNabb* and *Mallory* with respect to confessions, admissions or incriminatory statements **taken during an illegal detention.**

A consideration of the statutes and particularly Louisiana Revised Statute 15:77 leads to conclusion that the defendants were not accorded their rights under the statute of Louisiana, particularly when they were not allowed to use the telephone or send a messenger for the purpose of communicating with counsel and with friends and relatives for the purpose of securing counsel. The very fact of their incommunicado status was a flagrant violation of their statutory rights and any statements made during the illegal detention and denial of their statutory rights affected the statements subsequently made by them with illegality and invalidity. (*See Wong Sun vs. U.S.*)

It is most significant that Deputy McNeal never denied that he was asked permission by the accused to use the telephone when they were brought to the Sheriff's Office and placed in the radio room where he, McNeal, was in charge. It is not enough that Deputy McNeal stated that **"he could not remember"** any requests to use the telephone. In *Haynes vs. State of Washington*, 83 S. Ct. 1336 one of the officers testified that Haynes **"may have"** asked permission to call his wife. The Supreme Court of the United States ruled in this instance that this was not sufficient rebuttal of the defendant's claim and left exposed for review by the Court only the defendant's evidence or testimony and that this would be sufficient on review by the Court to establish the existence of impermissible police conduct barring use of the written confession ultimately obtained.

Major Henderson testified (see Page 184 of Motion

to Suppress Transcript Page 696) that neither he nor the District Attorney ever told either of the defendants nor any of the witnesses who were interrogated that they had a right and privilege of using the telephone or the right and privilege to send a messenger for the purpose of communicating with an attorney or communicating with their friends or relatives for the purpose of securing an attorney. Major Henderson further testified that he "figured" that Woodard and Hopper should have known their rights in view of their age and the fact that they were college students, and from the fact that they were college students "they must have studied government" and **should have known their rights.**

Deputy Bordelon testified (Page 246 of the Motion to Suppress Transcript Page 758) that it was only after the statement had been completed that the District Attorney told Woodard that he could get a lawyer.

Major Henderson also testified (Page 179 of the Motion to Suppress Transcript Page 691) that he asked the District Attorney, who was present, to tell Mr. Woodard his rights; that he, Major Henderson, told Hopper his rights. He further testified that the "rights" which Woodard and Hopper were told about were in essence as follows:

> "(District Attorney to Woodward) 'You don't have to make a statement. If you would want to and if you make a statement it can be used against you in a court of law; you are entitled to an attorney' ".

Major Henderson also testified (Page 183 of the Motion to Suppress Transcript Page 695) that he could not "recall" having mentioned to Woodard or Hopper what offense that he was interrogating him about. He further testified that he did not "recall" telling them that they

had a right to have a lawyer present while any statements were being given.

We readily concede that there is no "litmus-paper test" that a Court can look to or apply in order to determine whether a statement amounting to a confession was made voluntarily, that is, that it was the product of a free will. However, we respectfully submit when all of the relevant factors are considered and weighed together, which the Court must do (see *Culombe vs. Connecticut*, 367 U.S. 568, 601, and *Lynumm vs. Illinois*, 82 S. Ct. 917), a priori argument can be forcefully made that the statements purportedly made by these accused, and which are under attack, were not freely and voluntarily given.

The facts in this case reveal that the two accused were both young men, immature and not knowledgeable as to police procedures and techniques, particularly the more sophisticated techniques such as securing the faith and confidence of the accused with no indication on the part of the police of the dire results which might follow their giving a statement. Both young men were at the time of their interrogation obviously tried, did not have the full and normal use of their faculties, were apprehensive, were in a "strange country" so to speak, among people, none of whom they knew, still affected by the large quantity of alcoholic beverages that they had drunk. With respect to Hopper, we have the foregoing factors plus the severe injury to his ear and neck which must have caused him considerable pain and anxiety. The weakened condition of the defendants, particularly Hopper, when combined with the lack of any warning to either of them as to the constitutional safeguards to which they were entitled and their illegal detention could create an inference that the con-

fession or admission purportedly made by them was a product of an overborne mind.

Failure of the police to allow them to use the telephone for the purpose of securing advice and counsel from either an attorney or friends as the statute of Louisiana requires, the failure of the police to warn them of their constitutional right to remain silent and their constitutional right to counsel and to inform them that anything they might say could be held against them, the failure of the police to advise them as to the consequences that might follow from their giving a statement, the failure of the police to even remind them as to the purpose of the interrogation should, we respectfully submit, dissolve the contention made by the State that their confessions or admissions were freely and voluntarily given. Even if we take the District Attorney's testimony and that of Major Henderson as unimpeached (which we do not concede), we respectfully submit that the warning given by the District Attorney and/or Major Henderson falls far short of the minimum effective warning that the accused are entitled to under the law.

The concept of right to counsel as recently enunciated by the United States Supreme Court and various State Supreme Courts and Federal Courts of Appeal has as its core, as it must have, an effective warning and advice by the police as to the rights of the defendants, and not merely the superficial reference to an unexplained right such as were claimed to have been made by th District Attorney and Major Henderson to these two accused.

The United States Supreme Court has taken the position that confessions are excluded not only because they may be unreliable but also because they offend the concept of the accusatory system an essential part of the funda-

mental legal philosophy under which this nation was founded. See *Watts vs. Indiana*, 338 U.S. 49.

> "Our decisions under that Amendment (The Fourteenth) have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e. the product of coercion, either physical or psychological, cannot stand. This is not so because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: That ours is an accusatoral and not an inquistitoral system * * * a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers vs. Richmond*, 365 U.S. 534. These same concepts have compelled a greater reliance on the presence or absence of counsel as a fatcor in determining the voluntariness of a confession". *Haynes vs. Washington, supra; Lynumm vs. Illinois, supra; Culmobe vs. Connecticut; supra; Spano vs. New York*, 79 S. Ct. 1202; *Leyra vs. Denno*, 75 S. Ct. 716.

The right to counsel as pronounced in *Gideon* has been expanded as reflected by the cases which followed *Gideon* such as *Hamilton vs. Alabama*, 82 S. Ct. 157, which held that the accused was entitled to counsel at "arraignment" even if a plea of "not guilty" was entered, and that the accused were entitled to counsel at any "critical stage"; and *White vs. Maryland*, 83 S. Ct. 1050 which ruled that accused were entitled to counsel at a "preliminary hearing". (Also see *Carnley vs. Cochran*, 82 S. Ct. 884).

In 1964 the United States Supreme Court decided the case of *Escobedo vs. Illinois*, 378 U.S. 478. Subsequently, the Supreme Court of the State of California in *People vs.*

Dorado, 394 P. 2d 952, interpreted *Escobedo* to mean that once an investigation of a homicide was focused on a defendant, any incriminatory statements given by the defendants during the interrogation by investigating officers became inadmissible in the absence of counsel, and by failure of the officers to advise defendant of the right to remain silent, and the admission or confession obtained in such manner required reversal. There has been some difference of opinion as to whether *Escobedo* in fact held what *Dorado* said it held. However, on June 1, 1965 (85 S. Ct. 1793) the United States Supreme Court denied "certiorari" in *Dorado* and therefore it might be supposed that the United States Supreme Court approved the interpretation placed on *Escobedo* by the *Dorado* decision.

There is no sound basis for the argument that a **request** for counsel is a prerequisite to the right to counsel at the interrogation stage while it is not at any other. The test of waiver should be the same regardless at what stage of the proceedings it became an issue. In *Escobedo* the Supreme Court said:

> "The accused may, of course, **intelligently** and **knowingly** waive his privilege against self-incrimination and his right to counsel either at a pretrial stage or at the trial." (Emphasis supplied).

The Supreme Court of Oregon has also held that the failure to warn an accused of his rights to **remain silent** requires that the confession be suppressed. *State vs. Neely*, 395 P. 2d 557 (1964). See also *Commonwealth vs. McCarthy*, 200 N.E. 2d 264, (1964); *State vs. Dufour*, 206 A. 2d 82 (1965); *State vs. Hall*, 397 P. 2d 261 (1964); *Campbell vs. State*, 384 S.W. 2d 4 (1964).

In *Russo vs. New Jersey*, 351 F. 2d 429 (3rd CCA—

Rehearing denied October 13, 1965) defendants who were without counsel and **were not informed** of either their right to counsel or to their right to remain silent at the **time of their interrogation** which led to confessions admitted in prosecutions, were denied their right to counsel and were held entitled to habeas corpus in absence of an effective waiver of the right.

In *Miranda vs. Arizona*, 86 S. Ct. 1602 (1966) the court held not only must an accused's right to remain silent and to the assistance of counsel be jealously guarded at the stationhouse but waiver of those rights may be proved only by the most convincing evidence.

The heart of the majority's holding is that the Fifth Amendment reaches into the siationhouse and requires that the accused be **adequately** and **effectively** apprised of his rights and that the exercise of those rights be fully honored by the police.

The majority holds, the accused must be informed in clear and unequivocal terms that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to counsel. Moreover, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the accused so desires. This means that the police must make known to the accused that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation.

The Court stated incommunicado interrogation of an accused in police-dominated atmosphere, while not physical

intimidation, is destructive of human dignity and is at odds with the principle that an accused may not be compelled to incriminate himself.

To illustrate the heavy burden resting on the state to demonstrate that an accused knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel, the majority notes that a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was eventually obtained. Nor can there be any room for the contention that the privilege is waived if the accused answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated. The fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights.

Unless the record shows that an accused was **offered counsel** but intelligently and **understandingly rejected the offer,** there is no waiver of his right to counsel. (As to what constitutes "waiver" see *Carnley vs. Cockran, supra.*)

Major Henderson of the Avoyelles Parish Sheriff's Department testified that he did not feel that an explanation to the accused of their constitutional rights was necessary since they were college boys and "had studied government". We respectfully submit that it cannot be logically argued that every college student is aware of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution. The instant case is not one involving an accused such as there was in *Crooker vs. California,* 78 S. Ct. 1287. There the accused had been a law school student, had studied criminal law and when asked

to take a lie detector test informed the operator that the results of such a test would not be admissible at trial absent a stipulation by the parties; and the manner of the accused refusals to answer questions by the police indicated full awareness of the right to be silent. As a consequence of his background, the Court found that his confession was voluntary.

More apropos to the instant case is that of *Haynes vs. State of Washington, supra.* In *Haynes* the accused was held incommunicado without permitting him to telephone his wife until after he had made a written confession. The United States Supreme Court reversed the conviction. The Court considered pertinent the facts that (1) he was not taken before a magistrate and granted a preliminary hearing until he had acceded to the demands that he give and sign a written statement; (2) that there was no indication in the record that prior to signing the written confession or even thereafter Haynes was advised by authorities of his right to remain silent; (3) the police did not warn him that his answers might be used against him; (4) he was not told of his rights respecting consultation with an attorney.

It should be noted at this point that the trial court in the instant case refused to give the jury special charges concerning the rights, privileges and immunities to which the accused were entitled under the law and which affected the voluntariness of the confession or admission introduced into evidence. In *Haynes vs. State of Washington, supra,* the Court commented as follows:

> "The Jury was instructed in effect not to consider as relevant on the issue of voluntariness of his confession the fact that the defendant is not reminded that he is under arrest, that he is not cautioned that

he may remain silent, that he is not warned that his answers may be used against him or that he is not advised that he is entitled to counsel."

"Whatever independent consequences these factors may otherwise have, they are unquestionably attendant circumstances which he accused is entitled to have appropriately considered in determining voluntarines and admissibility of his confession."

In *Reck vs. Pate*, 81 S. Ct. 1541, the Supreme Court of the United States reversed the conviction of murder. Reck, the accused, was a nineteen year old youth of subnormal intelligence which, of course, is not involved in the instant case. However, the Court did consider other factors holding that there had been a violation of due process; and in reversing the conviction those factors pertinent to this issue were the long stretches of interrogation while he was held **incommunicado** and while he was **physically weakened** and in intense **pain.**

The totality of the circumstances involved in this case should be sufficient to cause substantial concern as to whether due process was accorded to the two young accused in this case. Conduct on the part of the law enforcement officers, any one or combination of which have been condemned by the United States Supreme Court are:

1) Prolonged questioning (five hours—*Haley vs. Ohio*, 68 S. Ct. 302; eight hours—*Spano vs. New York*, 79 S. Ct. 1202).

2) Failure to advise accused of his right to counsel (*Haley vs. Ohio, supra; Haynes vs. Washington, supra; Payne vs. Arkansas*, 78 S. Ct. 844).

3) Failure to remind accused he is under arrest: (*Haynes vs. Washington, supra; Payne vs. Arkansas, supra*).

4) Failure to caution him that he may remain silent (*Haynes vs. Washington, supra; Payne vs. Arkansas, supra*).

5) Failure to warn accused that his answers may be used against him (*Haynes vs. Washington, supra; Payne vs. Arkansas, supra*).

6) Deprivation of food or sleep (*Reck vs. Pate, supra; Payne vs. Arkansas, supra*).

7) Use of psychological techniques (*Leyra vs. Denno*, 74 S Ct. 716).

8) Threat of mob violence (*Payne vs. Arkansas, supra; State of Louisiana vs. Rideau*, 83 S. Ct. 1417).

9) Exposure to crowds (*Reck vs. Pate, supra*).

10) Psychological compulsion (*Haynes vs. Washington, supra*—accused not allowed to telephone wife; *Lynumm vs. Illinois, supra*—police told the accused welfare support of her children would be stopped).

11) Confession given while accused was physically weakened or in pain (*Reck vs. Pate, supra*).

12) Confession secured through trickery (*Spano vs. New York, supra*).

B. Whether Johnson v. New Jersey should be limited to its facts or whether it applies to instant case.

Principally, petitioners seek to bring before this Court the question of whether the Court should re-examine and limit to its particular facts the holding in *Johnson vs. New Jersey*, 384 U.S. 719, 86 S. Ct. 1772 (1966), relative to the date of application *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), inasmuch as the constitutional issues

had not been raised at trial in the *Johnson* case and the *Johnson* case dealt with a COLLATERAL attack on a judgment which had become FINAL long before the *Miranda* decision, but petitioners, on the contrary, bring before this Court a judgment which has not become final and assert that they are being denied the Equial Protection of Law under the Fourteenth Amendment by the application of the *Johnson* case because they did affirmatively assert and raise the same constitutional issues at the time of trial.

Secondly, petitioners show that the *Johnson* case does not absolutely preclude the retroactive application of the *Miranda* case as to the issue of determination of the freeness and voluntary nature of confessions, but on the contrary admonishes that its ruling should be used as a standard in such determinations.

Petitioners submit to the Court:

1) *Miranda* did not create new rights and therefore its ruling should apply in the instant case.

2) *Johnson* is factually distinguishable on material points and should not apply to the instant case.

3) The application of the *Johnson* case to the instant case denies petitioners the Equal Protection of law as petitioner timely asserted their right to exclude the unconstitutionally obtained confessions at and before TRIAL just as the defendants did in *Miranda*.

4) In any event, the Louisiana Supreme Court erred in not applying the standards and constitutional principals enunciated in *Miranda* to determine the issue of whether the confessions were free and voluntary.

Taking these points one at a time, it is rsepectfully urged that *Miranda v. Arizona* did not create new law but merely applied existing constitutional guarantees. This, it is submitted, the Court recognized in the *Miranda* decision at 384 U.S. 442, 86 S. Ct. 1611 when it stated:

> "We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that 'No person * * * shall be compelled in any criminal case to be a witness against himself,' and that 'the accused shall * * * have the Assistance of Counsel'—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured 'for ages to come, and * * * designed to approach immortality as nearly as human institutions can approach it.' *Cohens v. Commonwealth of Virginia*, 6 Wheat. 264, 387, 5 L. Ed. 257 (1821)."

It is therefore urged that these same constitutional guarantees were in effect at the time of petitioners trial and should have been recognized and protected. Certainly they could have done nothing more to assert these rights.

The *Johnson* case is distinguishable from the instant case which is on direct appeal in many material matters. This distinction can best be illustrated by quotation from the *Johnson* case wherein it was stated:

> "In this case we are called upon to determine wheth-

er *Escobedo v. Illinois*, 378 U.S 478 (1946), and *Miranda v. Arizona*, *ante*, p. ____, should be applied retroactively. We hold that *Escobedo* affects only those cases in which the trial began after June 22, 1964, the date of that decision. We hold further that *Miranda* applies only to cases in which the trial began after the date of our decision one week ago. The convictions assailed here were obtained at trials completed **long before** *Escobedo* and *Miranda* were rendered, and the rulings in those cases are therefore inapplicable to the present proceeding.

* * * * * *

"While the **present collateral proceeding** was pending following our decision in *Escobedo*, Cassidy filed affidavits in the New Jersey Supreme Court which detailed for the **first time** certain supposed circumstances of his confession.

* * * * * *

"Like Cassidy, Johnson filed affidavits in the New Jersey Supreme Court in this **collateral proceeding** following our decision in *Escobedo*, detailing for the first time certain supposed circumstances of his confession.

* * * * * *

"**These belated claims** like Cassidy's were left uncontroverted by the State and were accepted as true by the court below for resolution of the *Escobedo* issue.

"The confessions of Johnson and Cassidy were offered in evidence by the State at their joint trial for felony murder. The judge held a hearing out of the presence of the jury on the voluntariness of the confessions. Petitioners **made no effort to rebut** the testimony adduced by the State relating to this issue. The judge found the confessions voluntary and admitted them into evidence. Petitioners then

expressly **relinquished their right** under state law to have the issue of voluntariness, and the accompanying evidence, submitted to the jury for redetermination. They did not introduce any testimony to dispute the correctness of their confessions.

"In summation at the close of trial, defense counsel explicitly asserted that the confessions were truthful and pleaded for leniency on this ground. Cassidy's lawyer stated to the jury:

> 'Whatever is in this statement made by Stanley Cassidy is true. I know it is true . . . (M)y reason for knowing that it is true is because of the meetings and consultations I have had with Stanley. We have been over this many, many times.
>
> "I know it is true because I know Chief Dube, and Chief Dube is a fine interrogator. If you do not answer truthfully, believe me, he will question you until he does get the truth, and Chief Dube got the truth."

Likewise Johnson's lawyer told the jury:

> "The statement of Johnson was truthful and honest, because when that was finished, that was the end of it.
>
> . . . . . .
>
> "There were no threats. There was no attempt to evade. There was no trickery. Anything that Chief Dube asked him he answered honestly and truthfully."

The jury found Johnson and Cassidy guilty of murder in the first degree without recommendation of mercy, and they were sentenced to death.

"The convictions of Johnson and Cassidy **became final six years ago,** when the New Jersey Supreme Court affirmed them upon direct appeal and the

> time expired for petitioners to seek certiorari from the decision. There followed a battery of collateral attacks in state and federal courts, based on new factual allegations, in which petitioners repeatedly and unsuccessfully assailed the voluntariness of their confessions. This appeal arises out of still another application for post-conviction relief, accompanied by a **fresh set of factual allegations,** in which petitioners have argued in part that their confessions were inadmissible under the principles of *Escobedo.*"

While portions of the above quoted opinion in the *Johnson* case purports to have application to the instant case, it is also quite evident that this Court did not have the same factual situation before it as the instant case presents. This Court relied heavily in the *Johnson* case upon the fact that Johnson presented a belated claim for collateral relief on a final judgment, and which final judgment had become final long before the rules were announced in *Miranda* and *Escobedo.* Such is not the case in the instant case. Johnson and his co-defendant, Cassidy, hardly had the standing which petitioners have to raise these constitutional issues as well as the issue of being denied Equal Protection of the law. It therefore is submitted that the *Johnson* case does not present a proper factual situation for a final determination that petitioners who have asserted their constitutional claims under the Fifth and Sixth Amendment just as fully and TIMELY as any other defendant should not have these constitutional claims protected just because of the fortuitous circumstance that another defendant had his case heard by this Court first. Even if this Court were to reject petitioners contention in this regard it should be on a case factually similar to theirs rather than upon the facts of the *Johnson* case and for this reason the writ should be granted.

Finally, even if this Court is not disposed to re-examine the *Johnson* case, limit its holding, or distinguish it from the instant case, the Louisiana Supreme Court committed error prejudicial to the petitioners rights by TOTALLY rejecting the *Miranda* decision. This is in spite of an admonition by this Court in the *Johnson* case that the *Miranda* decision has limited application as part of the involuntariness claim.

The Louisiana Supreme Court summarily shut out any and all consideration of anything said by this Court in *Miranda* with a brief quotation from the Johnson case and then with these cryptic words:

> "We find that the ruling of the trial judge was correct. As stated *supra*, this case was tried and concluded during 1965, at which time *Miranda supra*, had not been decided. *Escobedo* applies. See *State v. Johnson*, 249 La. 950, 192 So. 2d 137; *State v. Carter*, 248 La. 730, 181 So. 2d 763." 203 So. 2d 242.

Such language as quoted above shows almost disregard for the language of this Court in *Johnson v. New Jersey*, wherein it was stated:

> "Thus while Escobedo and Miranda provide important new safeguards against the use of unreliable statements at trial, the non-retroactivity of these decisions will not preclude persons whose trial have ALREADY BEEN COMPLETED from invoking the SAME SAFEGUARDS as part of an involuntariness claim." 384 U.S. at 730; 86 S. Ct. at 1779.

In view of the above language, there appears to be no justification to totally disregard the safeguards of the *Miranda* case as was done to petitioners. To be sure that this Court intended that *Miranda* safeguards and standards be taken into account on involuntariness claim, the above mandate

was buttressed with the following language and authority quoted in the *Johnson* case:

> "Prisoners may invoke a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years. See *Reck v. Pate*, 367 U.S. 433 (1961). That test now takes specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance. See *Haynes v. Washington*, 373 U.S. 503 (1963); *Spano v. New York*, 360 U.S. 315 (1959)."
>
> * * * * *
>
> "We have pointed out above that past decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confessions. See *Haynes v. Washington, supra; Spano v. New York, supra.*"

Petitioners, therefore, have had their confessions judged by standards that do not comport to constitutional guarantees both as to the *Miranda* type of warning under the Fifth and Sixth Amendment and as to constitutional standards required to determine an involuntariness claim. Whether their claim of Equal Protection be sustained or not they are entitled to have the Louisiana Supreme Court judge the issue of voluntariness by consideration of the principals set out in *Miranda* as they have been so admonished in the *Johnson* case.

Part V. Cumulative Error

Each of the reasons advanced in Parts I, II, III, and IV for granting the writ are urged to individually and separately be sufficient grounds for granting of the writ

and reversal of petitioners' convictions. Additionally and alternatively these reasons are cumulatively and collectively advanced as creating a totality of circumstances under which it cannot be said that petitioners received a fair trial consistent with due process of law as required by the Fourteenth Amendment. Those reasons are incorporated by reference.

Particularly prejudicial to petitioners was the photographic color slides of the autopsy which because of a defense stipulation as to the cause of death were not material and had no probative effect except to inflame the jury.

The second witness called by the State in the trial of this case was Dr. John B. Maxwell, the pathologist who made the autopsy of the deceased at the request of the Avoyelles Parish Coroner. After Dr. Maxwell had been sworn, but before he answered the first question on direct examination, counsel for defendants stated the following:

> "Defense wishes to stipulate that Ralph Beeson died in the early morning hours of April 19, 1964; that his death resulted from trauma to the brain, incidental to and attendant to a basal fracture of the skull. Defendants wish to admit this for the record, Your Honor."

Subsequently, the State offered in evidence color slides identified as State Trial Exhibits 1-TB through and including 6-TB, which were a full face view of the deceased Beeson, the right side of the head of the deceased, the left side of the head of the deceased, the under side of the brain of the deceased, the floor of the skull of the deceased, and both lungs of the said deceased. These color slides were made by Dr. Maxwell during the course of his autopsy. When these color slides were offered in evidence, the defendants objected on the following grounds:

1) The proper foundation for their introduction had not been laid;

2) There was no predicate yet established that would permit the purported offerings to be received in evidence;

3) They were taken at a time too remote at the time to be relevant or material or of any probative value;

4) That they were not necessary or material to any issue or fact involved in this case at this time;

5) That they were gruesome, ghastly, shocking, emotional disturbing and would be prejudicial if received in evidence and viewed by the jury to the rights of the defendants;

6) That there is no dispute at this time as to the cause of death, there having been a stipulation prior to the testimony of Dr. Maxwell as to the cause of death (it was also stipulated 'we will stipulate further that the cause of death was as related by Dr. Maxwell in response to the interrogation of him by **defense counsel**").

7) That the autopsy and what is revealed thereby was not the handiwork of either of these two defendants but the handiwork and a professional handiwork as the result of Dr. Maxwell.

8) That there was no probative value that could be attached to the offerings; and also in addition to these objections is the contention by the defendants that the basis of the statement made by the District Attorney in his opening statement of the evidence that he proposed to introduce and will seek to introduce, that these slides are not the best evidence, that the District Attorney in his opening statement said "that there were photographs made of the deceased at the funeral home, that the body of the deceased was examined at the funeral home by Dr. Kaufman."

The Court overruled these objections made by the defendants and allowed the Exhibits referred to above to be admitted and filed in evidence and this Bill of Exception was reversed.

The stipulation which is quoted in the Bill of Exception, and the principles of law which we will hereinafter state, should make it crystal clear that the Court's ruling admitting these color slides in evidence and to be viewed by the Jury constituted prejudicial error.

The color slides to which we have reference and the photographs produced therefrom were taken approximately 7 to 8 hours after Beeson's death and accordingly could not be considered as res gestae.

The Coroner and Dr. Maxwell, a Pathologist, testified at length as to the cause of death. Accordingly, it cannot be said that the color slides and their counterpart photographs had any probative value.

In 23 *C.J.S. Sec. 851* (1) p. 352, the rule is stated as follows:

> "Where photographs are otherwise properly admitted, it is not a valid objection to their admissibility that they tend to prejudice the Jury, as in the case of photographs of the victim's body or wounds, or that the scene of the crime; but **the test of admissibility in such cases is whether the probative value of the photographs outweighed their probable prejudicial effect.**" (Emphasis added.).

18 *La. Law Review* 139 the following comment is made:

> "In *State vs. Morgan* (30 So. 2d 434) the Supreme Court indicated that gruesome photographs of the

deceased victim in a criminal case should be excluded if they have little or **no probative value,** and involve a **substantial risk of undue prejudice.** Although the writer feels that the approach taken in the *Morgan* case is sound, it must be recognized that subsequent cases have whittled away its persuasiveness as authority."

Further, on the above cited comment, the writer states:

"The process suggested by the *Morgan* case of balancing the probative value of the photographs against the risk of undue prejudice seems to be an appropriate one, and it is hoped that the theory underlying the *Morgan* case will not be abandoned."

In 1963, the Louisiana Supreme Court decided *State vs. Morris,* 157 So. 2d 728. In view of the similarity of facts in *Morris* and the instant case, we beg the indulgence of the Court in quoting at length therefrom:

"The Fourth Bill was taken to the admission into evidence and their projection on the screen of 15 photographic **color slides** which showed the body of the deceased immediately **prior to and while undergoing an autopsy.** Before their introduction, the State without objection from defendant had offered and filed 2 black and white photographs of decedent's body which clearly disclosed the 5 bullet wounds and their location (4 were in the abdomen and 1 in the right leg). Furthermore, **the Coroner had already testified very definitely that death resulted from the gunshot wounds** in the abdomen and hence **its cause was not a contested issue.** In fact, in an opening statement defense counsel had declared to the Jury that the 'Killing' had resulted in the manner related by the District Attorney. A full confession also had been introduced without objection. The sole issue in the case then was whether the killing was intentional or whether it was done in the heat of passion, the defense con-

tending for the latter and asking for penalty less than the death sentence. (Emphasis added).

"Most of the photographic color slides are indeed gruesome and ghastly. The first two were virtually a reproduction in color of the previously introduced black and white pictures. They are merely cumulative and not particularly objectionable. The third was taken while looking at the body from the head downward upon the commencement of the autopsy. However, the fourth and fifth show the lengthy incision of the autopsy, and laying bare of the inner portion of the body, and the suction apparatus evacuating some of the bloody contents of the body cavity. The remaining pictures are increasingly grotesque and revolting. In many of them the hands of the coroner and his assistant are shown holding various organs within the bloody opening."

The Louisiana Supreme Court then went on to discuss the general rule and the exception to the rule:

"Particularly applicable to the instant case are the following observations of the Oklahoma Court in *Oxendine vs. State, supra:* 'It is apparent from the cases heretofore cited that if the pictures of a homicide victim made subsequent to his death are gruesome or ghastly, and carry danger or prejudice, they are **inadmissible unless they are relevant to some material issue** and would reasonably assist the jury in the determination of the defendant's guilt, and **this relevancy must outweigh the danger that the Jury would substitute** emotion for reason as the basis of their verdict.'" (Emphasis added).

"In the case at Bar there was no reason for the introduction of the color slides. **There was no issue nor controversy as to the cause of death.** The defendant admitted the crime in intricate detail. The photos could not possibly lend assistance in the determination of the defendants' guilt. It was admitted. Had there been a conflict as to the shooting

or cause of death or location of the wounds or an issue to which the photos were relevant, then and in that event, they would have been admissible had they have been prior to the performance of the autopsy. But the autopsy was not the handiwork of the defendant **and could under the circumstances serve no other purpose than to arouse the emotions and passion of the Jury.** This Court feels that the photos were wholly inadmissible in the form presented and their admission was an abuse of the Trial Court's discretion. If the photographs had been limited to the area showing the points of entrance and possible egress of the bullets without showing the gruesome incisions incident to the autopsy, the action of the Court in the admission of such cumulative evidence could not be held to be reversible error, but the pictures of the nude body of the young woman showing the stated visual results of the autopsy could not help but shock the viewer. **The whole procedure seems to have been so unnecessary and was highly prejudicial and forces a reversal."** (Emphasis added).

In commenting on the decision in *Morris, supra*, it is stated in 25 La. Law Review, 162:

"The color slides were irrelevant since they did not tend to be probative of the proposition at which they were directed, the **cause of death.** A lay Jury was incapable of determining whether the organs were diseased. Even if the pictures had been probative of the cause of death, they would have been excluded on the theory that the **cause of death was not at issue.** The killing was an admitted fact. Relevant evidence—an appelation certainly not applicable to the 15 color slides presented in *State vs. Morris*—is admissible if the probative value is not outweighed by the dangers of the undue prejudice, abstraction and waste of time. After arguing relevancy, the State contended that if the pictures were irrelevant the defendant was not prejudiced. How-

> ever, the Supreme Court, after viewing the slides, held the pictures were inherntly prejudicial because they were 'in such form as to be highly shocking and emotionally disturbing to the mind of an average individual.'" (Emphasis added).

Even standing alone the defendant was denied substantial rights by the permitting of the jury to view as evidence outside of the presence of defendants the jail in which they had been incarcerated. In Louisiana, the jurisprudence has laid down the rule that a defendant who is on trial for a felony must be present in court during every important stage of the trial. *State vs. Layton*, 158 So. 375; *State vs. Futrell*, 106 So. 651; *State vs. Christian*, 30 La. Ann. 567.

In *Louisiana Law Review*, Volume 4 at page 622, it is stated:

> "The various jurisdictions are in conflict as to the necessity or even the right of the accused to be present at the viewing of the scene of the alleged crime by th Jury. In jurisdictions which consider the view by the Jury as the taking of evidence and an important phase of the trial, the constitutional right of confrontation is violated if the accused is denied the right to be present."

Also in Volume 4 at page 623 it is stated:

> "In Louisiana, viewing the scene of the alleged crime is uniformly considered **as taking evidence;** therefore, the accused has a constitutional right to attend and it is an error to deny him this right. Failure to file a timely objection has been held not to prevent the accused from raising an error on appeal. However, where the accused was present at the viewing and voluntarily remained out of the sight of the Jury without objecting to this irregu-

larity and could show no injury or prejudice, he could not later raise the error."

It is respectfully submitted that inasmuch as this was a capital case and the constitutional right of the accused was involved, his right to be present when the Jury viewed a truck outside the Courthouse and when the Jury viewed the toilet facilities in the Avoyelles Parish Jail could not be waived by his counsel.

Even if it is concluded that defendants could "waive" this right, it is respectfully submitted that there was no waiver in the instant case for the reason that neither of the defendants declined to accept the privilege and as a matter of fact when the Jury viewed the toilet facilities in the Jail, their counsel was not aware of their absence for the reason that in the confusion and crowd that went to the Jail, their absence was unnoticed.

The accused in a criminal prosecution in which a view of the place where the crime was committed is ordered is deemed to have waived his right to be present when the view is taken, where the Court expressly grants him permission to accompany the Jury, and **he declines to accept the privilege.** See *Kanner vs. United States*, 34 F. 2d 863.

In *State vs. Pepper*, 180 So. 642, the Louisiana Supreme Court reversed the conviction of the accused who was not present at a view by the jury, and held that the right of the accused to be present could not be waived by counsel, and that any waiver must be by the **accused** himself. It was further held that **waiver by the accused** must be shown by the court **minutes**; a showing of waiver by the counsel for accused in the court's per curiam or minutes is not enough.

In *14 American Jurisprudence*, "Criminal Law" Sec-

tion 196, the rule relative to the right of the accused to be present at a view by the Jury is set forth and Section 199 is devoted to discussion of the "waiver of right" of the accused to be present. In the latter section of the authority cited, it is said:

> "There is a direct conflict among the authorities as to whether one accused of crime can waive his right to be present at the trial. According to the prevailing view, if the felony **is not capital** and the accused being at large on bail, is present at the beginning of the trial but thereafter voluntarily absents himself or being in custody makes his escape from the jurisdiction, the Court has a right to proceed with the trial to its completion and the absence of the defendant operates as a waiver of his constitutional right to be present at every stage of the trial. In **a few jurisdictions** the accused may waive his right to be present even in **capital cases.** Sometime some statutory authority to waive the right exists." (Emphasis supplied).

It is further stated in 14 American Jurisprudence, "Criminal Law" Section 200, at Page 907 that:

> "As a general rule, counsel cannot waive the right of the accused to be present."

Ordinarily there might be no significance attached to the absence of the accused at the viewing of a scene such as involved in this case; however, the importance of their absence was brought into sharp focus in this case by reason of the remarks made by the District Attorney in his closing-rebuttal argument and which have been quoted hereinabove.

Petitioners have seriously contended and still contend that each individual error complained of has standing alone denied them certain fundamental constitutional rights. But even if it were to be held by this Court that such is

not the case, then petitioners contend that they are entitled to have the totality of the circumstances of the trial and cumulation of errors weighed in order to determine whether their constitutional rights have been violated. Petitioners urge that a microscopic examination of each individual error complained of by a state court, without regard to the overall effect of the multiplication of a magnitude of errors compounded each upon the other, cannot be dispatched by the mere recitation that as to each individual error defendants have not shown that they are prejudiced. Such a course might be likened to not seeing the forest for the trees.

It is submitted that this Court, while hesitating to impose its McNabb-Mallory Rule upon the states directly, has on occasions when reviewing confessions looked to the **totality of the circumstances** to determine their voluntary and legal character and, in fact, excluded confessions on such ground. See *Fikes v. Alabama*, 352 U.S. 191, 77 S. Ct. 281, (1957); *Culombe v. Connecticut*, 867 U.S. 503, 83 S. Ct. 1960 (1961); *Haynes v. Washington*, 373 U.S. 503, 83 S. Ct. 1336 (1963). Similarly, this Court, against the contention that a pre-*Mapp v. Ohio* admission of illegally obtained evidence constituted in that case harmless error, rejected the contention and stated it could not "ignore the **cumulative prejudicial effect of this evidence** upon the conduct of the defense of this trial." *Fahy v. Connecticut*, 375 U.S. 89, 91, 84 S. Ct. 229, 232 (1963).

The courts below never determined upon the evidence as a whole and in its entirety that the defendants had a fair trial, but rather they determined or concluded that as to each error the courts did not find prejudice to the defendants. This is not the same thing as to hold that the totality of the circumstances showed that the defendants

had a fair trial consistent with their constitutional guarantee.

To treat each error piecemeal and individually in a trial is to treat it like a grain of sand or drop of water out of its natural habitat. But it must be remembered:

> Little drops of water, little grains of sand,
> Make the mighty ocean, and this pleasant land.

Only by applying a "totality of circumstances" test and theory of prejudice from cumulative error can a realistic determination be made as to whether the petitioners received a **fair trial** as they are entitled to under the due process of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court below is erroneous. For the individual reasons assigned in Parts I, II, III, and IV, and, alternatively and additionally, under a totality of circumstances test and a theory of cumulative prejudice from errors, the present petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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BY_____
CAMILLE F. GRAVEL, JR.

CERTIFICATE

I certify that a copy of the foregoing application has been served upon the opposing counsel: Jack P. F. Gremillion, Attorney General, State of Louisiana, State Capitol, Baton Rouge, Louisiana; William P. Schuler, Second Assistant Attorney General; Harry H. Howard, Assistant Attorney General, 104 Supreme Court Building, New Orleans, Louisiana, by placing same in the United States Mail, properly addressed, with sufficient postage affixed thereto.

Alexandria, Louisiana, April ....., 1968.

CAMILLE F. GRAVEL, JR.